called to the August 1, 1967 lease between appellants' predecessors and North Suburban Sanitary Sewer District (A-36). That lease was entered into three years after the purchase agreement and leaves no room for doubt that the parties intended a month-to-month lease relationship in its commonly understood sense.

Respondent submits that the trial court's interpretation of the lease provision of the purchase agreement is the correct one and must stand.

CONCLUSION

The trial court's interpretation of the purchase agreement is the correct one and ought not be distrubed.

Respectfully submitted,

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State of Minnesota
In Supreme Court

STATE OF MINNESOTA,
Respondent,

vs.

BOSTON PAUL VAIL,
Appellant.

APPELLANT'S BRIEF AND APPENDIX

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STATE OF MINNESOTA,

Respondent,

vs.

BOSTON PAUL VAIL,

Appellant.

APPELLANT'S BRIEF

LEGAL ISSUES

1. May the Court infer from the quantity and price of the substance that the defendant probably tested it and believed it to be marijuana; and may the Court further use such inference as proof beyond a reasonable doubt that the substance was, in fact, marijuana?

Lower Court held: In the affirmative.

2. In a prosecution for sale of marijuana, must the State prove beyond a reasonable doubt that the substance involved was Cannabis Sativa L., as distinguished from other species of Cannabis; and may the Court use an inference as to defendant's belief as proof beyond a reasonable doubt of this botanical identity?

Lower Court held: In the affirmative.

3. Is the classification of marijuana in Minn. St. 152.02, Subd. 2, arbitrary and irrational based on the criteria set forth in Minn. St. 152.02, Subd. 7(1), and therefore unconstitutional under the equal protection clause of the Fourteenth Amendment to the United States Constitution?

Lower Court held: In the negative.

PROCEDURAL HISTORY

May 10, 1976—Defendant arrested

May 11, 1976—Appearance in County Court

May 20, 1976—First appearance in District Court

Sept. 23, 1976—Hearing on Defendant's Motion to Dismiss on constitutional grounds

Oct. 12, 1976—Order denying Motion to Dismiss

Oct. 18, 19, 1976—Trial in District Court

Dec. 7, 1976—Findings, Determination of Guilt, and Memorandum

Dec. 20, 1976—Defendant files Appeal

Jan. 18, 1977—State files Notice of Review

March 30, 1977—Transcript delivered

STATEMENT OF THE CASE

Defendant was arrested May 10, 1976, pursuant to a criminal complaint charging him with sale of a controlled substance, to-wit, marijuana. Defendant moved to dismiss

on the ground that the statutes under which he was charged are unconstitutional. District Judge O. Russell Olson heard testimony on this motion at Olmsted County District Court on September 23, 1976, and subsequently denied the motion. Trial to the Court was held October 18 and 19, and on December 7 Judge Olson entered his finding of guilty. Imposition of sentence was stayed pending this appeal.

Testimony at the September 23 hearing showed the following: Marijuana meets none of the statutory criteria (Minn. St. 152.02, Subd. 7) for inclusion in Schedule I. It does not have a high potential for abuse (T. 56, 59). It does have currently accepted medical use (T. 53). It is safely used under medical supervision and cannot be abused by overdose (T. 65). Conversely, alcohol and nicotine meet all three criteria, but are not included in Schedule I (T. 65-68). This evidence was presented and explained in great detail by Marc Kurzman, R. Ph., J.D. The State offered no rebuttal evidence.

Testimony at the trial was as follows:

Mark Rosasco testified that he obtained some 225 pounds of what "looked like marijuana" (T. 42) from Defendant, and agreed to pay $100/lb. Rosasco in turn sold it to Greg Sickler, an undercover agent, for $115/lb. (T. 66).

Anne Rummel, a chemist with the state B.C.A., concluded on the basis of the three standard tests (microscopic, Duquenois-Levine, and thin layer chromatography) that the substance involved was marijuana (T. 230, 244, 264). Her cross examination and the testimony of Professor Kurzman, however, established the following:

1. Microscopic Test—At least 24 plant families (average 100 species each) contain cystolith hairs. Nakamura has found that about 80/600, or 13% of the plants have cystolith hairs which are similar to those of Cannabis. Since there are over 250,000 species of flowering plants in the world, the 13% potentially represents a great number of species . . . over 30,000. (Ms. Rummel indicated familiarity with this.) (T. 285-291; 362-363).

2. Duquenois-Levine Color Test—The Levine modified test has now been proven to be simply a test for moderate molecular weight resorcinols, common plant chemical substances. The original Duquenois test was recognized in the 1960's as being highly nonspecific. DeFaubert Maunder has reported finding (in a limited plant sampling) 25 plants species besides Cannabis which will give a positive Duquenois-Levine test. (A-66) *supra* Smith has also found that 12 of 40 common plant oils and extracts will give a positive Duquenois-Levine test. (Ms. Rummel indicated familiarity with this). (T. 298-301; 354).

3. Thin layer Chromatography (in a single "run" or solvent system)—Studies by Connors and Sunshine lead one to the conclusion that about 1 out of 10 (or 10%) of chemical substances would "pass" the thin layer chromatographic test (T. 365-366). If one estimates there are about 1,000,000 chemical substances in the plant kingdom, then there are about 100,000 which would give a "false positive" thin layer chromatographic test (T. 367).

Testimony concerning the genus/species issue was conflicting. Ms. Rummel testified that, as far as she knew, the

genus, *Cannabis,* was monotypic, i.e., having only one species, *sativa L.* (T. 278-281). She was unable to quote a single scientific report or study supporting her position. She also expressed unfamiliarity with published scientific reports to the contrary by numerous nationally and internationally renowned botanists. Professor Kurzman testified that he had seen herbarium samples of plants from species other than *sativa L.,* i.e., *Cannabis ruderalis* and *Cannabis indica.* He further testified that there are a number of observable differences (which have been documented and published by scientific journals), between the species ranging from anatomy of the woody stem to the shape of achenes (fruit) to height, brancing, leaf shape, etc. (T. 358-361).

As the trier of fact, Judge Olson made the following determinations:

1. Cannabis is polytypic, not monotypic, or at least doubts on the matter must be resolved in favor of the Defendant. The State must therefore prove that the substances involved was *Cannabis sativa L.* as distinguished from *Cannabis ruderalis* or *Cannabis indica.* (Memorandum, 2-4).

2. The Duquenois-Levine Test is only a screening test that is not specific for marijuana. (Memorandum, 4).

3. Thin layer chromatography is a means of screening and is not adequate for identifying marijuana. (Memorandum, 4-5).

4. Microscopic analysis, when combined with gas chromatography, mass spectroscopy, is capable of identi-

fying marijuana, but that test was not used in this case. (Memorandum, 5).

5. The seller of 220 pounds is probably sophisticated enough to have made his own tests, by smoking the product or otherwise, and probably was not "fooled" when he purchased it. These inferences, together with the inadequate screening tests used by the State in this case, produce a finding that Defendant sold *Cannabis sativa L.*, and is guilty. (Memorandum, 6-8).

ARGUMENT

I.

THE TRIAL COURT HAVING HELD THAT THE STATE HAS THE BURDEN OF PROOF THAT THE DEFENDANT SOLD *CANNABIS SATIVA L.* AS DISTINGUISHED FROM *CANNABIS INDICA* OR *CANNABIS RUDERALIS* AND THAT THE TESTS USED BY THE STATE WERE INADEQUATE TO PROVE THE IDENTITY OF AN UNKNOWN SUBSTANCE AS EVEN BEING IN THE GENUS *CANNABIS* ERRED (1) IN UTILIZING INFERENTIAL "EVIDENCE" WITH NO BASIS THEREFOR IN THE TESTIMONY OR OTHER MATERIALS PRESENTED; AND (2) ALTERNATIVELY, IN UTILIZING SAID INFERRED EVIDENCE TO IDENTIFY THE ALLEGED CONTRABAND AS BELONGING TO THE GENUS *CANNABIS* WITH THE SPECIFIC SPECIES DESIGNATION OF *SATIVA L.*

(1) The instant case was tried to the court pursuant to Rule 26.01 Subd. 2 M.R. Crim. P. The notes to that rule suggest it is taken from Rule 23(c) F.R. Crim. P. It is

the contention of appellant that the finding of fact by the Trial Court judge with regard to "Inferences Identifying the Substance from Nonscientific Evidence" (Memorandum, 6) are clearly erroneous and amount to prejudicial error. As such, the verdict based thereon must be reversed. *U.S. v. Rischard,* 471 F. 2d 105 (8th Cir. 1973).

The trial judge found some probative value in the tests used by the state to identify an unknown sample as "marijuana" although he indicated that those tests are *not sufficient* to *identify* an unknown sample as "marijuana" (Memorandum, 6). The remaining question therefore is whether other evidence presented adds sufficiently to the probative value so as to establish proof beyond reasonable doubt as to the identity of an unknown sample as "marijuana."

After stating that:

> "It is not enough under Minnesota Law to prove that a Defendant "believed" the substance was marijuana; there must be proof that the substance in fact was that." (Memorandum, 1),

the trial judge utilized *inferred belief* to bootstrap an insufficient identification by the state to an identification beyond reasonable doubt, stating that:

> ". . . a seller of a product containing 220 pounds is *probably* sophisticated and competent and alert enough to have made his own tests before he himself bought the product for presumably a considerable sum of money from his supplier." (emphasis added) (Memorandum, 7)

There is no support for the above statement anywhere in the record. Neither the prosecution nor the defense introduced *any* evidence as to where appellant obtained the plant materials allegedly sold to Mr. Rosasco. It is as reasonable to assume that appellant "harvested" a selection of green leafy materials from a field of hops growing outside Rochester as it is that he "bought the product for a considerable sum of money from his supplier" as inferred by the trial judge. Further, it is equally as reasonable to assume that appellant probably didn't conduct his own tests as it is to assume that he did. In fact, the uncontradicted testimony of the defendant at the hearing following the trial was that he had never tested or smoked the substance (Determination of Guilt, 5). The unsupported conjecture of the trial judge is clearly erroneous. Since the trial judge himself indicated the insufficiency of the state's evidence, without the additional probative value of the judge's inferred "facts" the erroneous consideration of the inferred "facts" is clearly prejudicial.

This case is distinguishable from *State of Minnesota v. John Michael Dick* (decided by this Court April 22, 1977). In the instant case, when challenged, the state's witness agreed that other substances "passed" one or more of the screening tests used and further that many other plant materials had the same microscopic characteristics as those found in "marijuana" and "passed" the modified Duquenois test (Duquenois-Levine) (T. 300). Further, when challenged, the state's witness admitted that the oft-repeated litany (that "no other plant has the same microscopic characteristics, smell and will pass the same tests" as marijuana) is without scientific foundation (T. 285-286,

287, 299, 300, 309). She also admitted that the substance, not having been purified before testing, could have been a mixture of plant materials with substance A "passing" the microscopic examination, substance B "passing" the Duquenois-Levine color test, and either A or B "passing" the thin-layer chromatograph, or equally as possible, A "passing" the microscopic and Duquenois-Levine with B "passing" the thin-layer chromatograph). The insufficiency for identification of the "tests" used by the state to obtain criminal convictions is all the more tragic when the resources and expertise is available to make adequate identification which would satisfy the reasonable doubt standard of proof (T. 367-369).

Finally, the Trial Court in its analysis of the scientific evidence presented in this case concluded that:

> "Backed with scientific testimony which we have in this case that is clearly more competent than that offered by the State, it seems doubtful that this Court can rely on those tests in such a circumstance alleging felonious criminal wrong." (Memorandum, 4)

(2) "Marijuana" is defined in Minn. Stat. Section 152.01 Subd. 9 as:

> ". . . all parts of the plant *Cannabis Sativa L.*. , . . ."

The Trial Court found that the Minnesota Statute:

> "seems to make illegal the possession of the one form of Cannabis [*Sativa L.*] and probably not make illegal possession of the other two species: Cannabis ruderalis and Cannabis indica." (Memorandum, 3)

The Trial Court's finding in this regard has firm foundation in the record (contrast T. 277-281 with T. 358-361) and is easily distinguishable from the line of cases holding to the contrary—that the botanical term *Cannabis sativa L.* means or should mean all species of *Cannabis.* This line includes: *United States v. Walton,* 514 F. 2d 201 (D. C. Cir. 1975); *United States v. Honneus,* 508 F. 2d 566 (1st Cir. 1974); *United States v. Sifuentes,* 504 F. 2d 845 (4th Cir. 1974); *United States v. Burden,* 497 F. 2d 385 (8th Cir. 1974); *United States v. Gaines,* 489 F. 2d 690 (5th Cir. 1974); *United States v. Rothberg,* 351 F. Supp. 1115, *aff'd* 480 F. 2d 534 (2nd Cir.), *cert. den.* 406 U.S. 909 (1972); *United States v. Moore,* 330 F. Supp. 684, *aff'd* 446 F. 2d 448 (3rd Cir. 1971).

It is interesting to note, however, that a careful reading of each of the above cited cases reveals a bootstrapping phenomenon as each court relates back for support in its ruling to *Moore* and *Rothberg, supra.* The *Moore* court held that "the legislative history of the Federal marijuana statutes reveals that Congress intended to include all varieties of marijuana or *Cannabis* within the statutory definition." 330 F. Supp. 686; yet the *Moore* opinion provides no account of the legislative prologue to the enactment of these statutes. The *Rothberg* court attempted a slightly more extensive canvass of the relevant legislative history and concluded that there was no doubt as to what the term *Cannabis sativa L.* meant, "it is a phrase whose meaning was clearly understood by Congress at the time of the enactment of the statute." 351 F. Supp. at 1118. According to the *Rothberg* court, there was a general consensus of opinion among botanists in 1937 (the year of the enactment of the statute they were considering) that *Cannabis* was monotypic and thus it follows that "at the time of the enactment of 21 U.S.C. Sec. 176a and 26 U.S.C. Sec. 4761, Congress not only meant to but actually did include *Cannabis indica* in using the term 'Cannabis sativa L.' " 351 F. Supp. at 1118.

The fallacy in relying on *Moore* and *Rothberg,* which construed a 1937 statute, becomes apparent when we recognize that the other five courts were construing a *1970* statute (The *Uniform Controlled Substances Act of 1970*—the present federal law and the model for Minnesota's present state statute). If, as stated in *Honneus, supra* "the issue is not whether marijuana is monotypic or polytypic but what Congress meant when it used the term "Cannabis sativa L.'," 508 F. 2d at 575, then we must look to the understanding of the term in 1970, not in 1937. In 1967 when the United States became a signatory of the Single Convention on Narcotic Drugs Treaty which provided that "cannabis plant" meant any plant of the genus *Cannabis,* a presumption of knowledge as to the multiplicity of species of the genus *Cannabis* was established. Yet, three years later when the 1970 Uniform Controlled Substance Act was enacted we are being told that the legislative intent which applied in 1937 still applies, regardless of the scientific advances in the interim.

In *United States v. One Chevrolet Sedan,* No. 73-1340-Civ-Ca (S.D. Fla. Jan 16, 1974), the court in addressing the mono v. polytypic issue reasserts the adage "*Expressio unius est exclusio alterius*" and expresses in dictum that

when more than one species have been found to exist, and the legislature is apprised of that finding, the drafting subsequent to that finding of a statute to include only one specie expressly excludes all other species.

In addition to arguing (1) that *Moore* and *Rothberg* were wrong in assuming a legislative history wherein a general botanical understanding of *Cannabis sativa L.* included other species of *Cannabis,* and (2) that regardless of the validity of *Moore* and *Rothberg,* the botanical term, *Cannabis,* in 1970 was known to include species other than *sativa L.,* thus making it encumbent upon Congress to list more specifically the substance they wish proscribed, a more recent decision presents a third, more compelling argument to suggest a resolution of this issue.

In *United States v. Lewallen,* 385 F. Supp. 1140, 1142 (W.D. Wis. 1974) the court stated:

> I see no need to undertake to restate here all the factors bearing on ascertainment of Congressional intent, nor all the conflict within scientific circles concerning whether *Cannabis* is monotypic or polytypic. I cannot escape the conclusion that Congress has failed to include within a penal statute possession, with intent to distribute, of *Cannabis* other than *Cannabis sativa L.* 21 U.S.C. §§841(a)(1), 812(c) (Schedule I, (c)(10), 802(15)). I do not think it would be sufficient, even if the Congressional history were clear (and it seems far from clear) that Congress thought that *Cannabis sativa L.* included every form of *Cannabis* in which tetrahydrocannabinol is present. It seems clear that if in a penal statute Congress used a word like "giraffe" from the animal kingdom, the statute could not be contrued to include a "potato"

> from the plant kingdom. This would be true even though the Congressional hearing and floor debate made plain that the members thought that the term giraffe includes potatoes. I understand, of course, that in the language of taxonomy, categories of "kingdoms" are based upon more gross distinctions than those involved in categories of classes, subclasses, orders, families, genuses, and species, and I understand that the distinctions among kingdoms, specifically are far more gross than the distinctions among species. But the decisive point, it seems to me, is that those whose very function is to weigh the significance of distinctions between plants within a genus—the plant taxonomists—consider the distinctions among *Cannabis sativa L.* and *Cannabis indica Lam.* sufficient to categorize them as different species. It does not seem to me decisive whether those engaged in botanical taxonomy had addressed and investigated this question deliberately and consciously, and had arrived at some scholarly consensus, prior to 1938 or prior to 1970, when Congress acted, or whether this came later. Rather, the critical factor is whether in fact the distinctions between *Cannabis sativa L.* and *Cannabis indica Lam.* (and perhaps *Cannabis ruderalis Jan.)* are so insignificant that they are not to be treated as distinct species within the genus *Cannabis.* . . But this is not the case of a vague statute which can fairly be applied to core conduct but cannot fairly be applied to conduct falling near its indistinct periphery. This statute is not vague; it applies to *Cannabis sativa L.* and to nothing else.

District Judge James E. Doyle then grated a defense motion for a judgment of acquittal stating that the government "failed to prove by any measure of proof, and surely

not beyond a reasonable doubt that (the) government's exhibit . . . is Cannabis sativa L., as distinct from other species of Cannabis."

Having concluded, as the Trial Court did in the instant case, that the state has the burden of proof beyond reasonable doubt that appellant was in possession of the specific specie proscribed by Statute, *Sativa L.;* and further, that the other species, *ruderalis* and *indica,* may also contain THC, the irrelevance of the "inferred evidence" becomes clear. Even assuming, arguendo, that all of the Trial Court's inferred assumptions are accurate, none of them speak to the *botanical identity* of the substance.

It is well settled that criminal laws must be strictly construed, and that persons cannot be punished for conduct which is not clearly proscribed by the statute. In a lengthy and scholarly opinion written by the Hon. Charles W. Helleck of the Superior Court of the District of Columbia (United States v. Collier (Super. Ct., Dist. of Columbia, March 19, 1974)), we were reminded that "in construing criminal statutes, courts are bound to follow certain principles firmly rooted in the common law, and the Constitution, sometimes given shorthand expression in the maxim *nullam crimen sine lege* (roughly translated as "no crime without Law") (Collier, p. 7).

The United States Court of Appeals for the District of Columbia Circuit has again reaffirmed that principle (*Zaimi v. United States,* 476 F. 2d 511, 523 (D.C. Cir. 1973)) stating:

> (t)he governing principles is that penal statutes are to be interpreted with exactitude, a rule deriving sustenance from considerations more ancient than the Nation itself. "Reasonable precision in the definition of crime has been regarded as a desideratum by free people since the early days of the common law." Moreover, the specifications of criminal offenses is peculiarly the business, not of courts, but of legislatures. Criminal statutes are thus "to be construed strictly, not loosely"; "(s)tatutes will not read to create crimes . . . unless the purpose to do so is plain; and 'ambiguity' concerning the ambit of criminal statutes 'should be resolved in favor of lenity.' So it is that one 'is not to be subjected to a penalty unless the words of the statute plainly impose it.' " (*Zaimi* at 521)

Criminal statutes are not to be broadened beyond the fair import of their language; they may not be held to extend to cases not covered by the words used. Before one may be punished, it must appear that his case is plainly within the statute; there are no constructive offenses.

The notion that "(p)enal statutes must be strictly construed against the government" (*National Staffing Consultants, Inc. v. District of Columbia,* 211 A. 2d 762, 763 (D.C. App. 1965)), is not judicial obstruction of the legislative will, but rather is a mandate that the legislature make every possible effort to precisely delineate the boundaries of the criminal law (*Zaimi* at 524 (D.C. Cir. 1973)). Thus it is that in drafting penal legislation, "(t)he burden lies on lawmakers, and inasmuch as it is within their power, it is their duty to relieve the situation of all doubts" (*Snitken v. United States,* 265 F. 2d 489, 494 (7th Cir. 1920)).

The Minnesota legislature has itself provided that "when the words of a law in their application to an exist-

ing situation are clear and free from all ambiguity, the latter of the law shall not be disregarded under the pretext of pursuing the spirt." Minn. St. 645.16.

Against a background of these basic principles, statutory construction in a marijuana case would not appear to be difficult, given the plain and unambiguous language of a statute making illegal only the possession of a particular specie of plant, *Cannabis sativa L. "Cannabis sativa L."* is a botanical term of art, and technical words must be construed according to their technical sense, unless it is apparent that a different meaning was intended by the legislature (*NLRB v. Coca Cola Bottling Co.,* 350 U.S. 264, 269 (1956); *United States v. Collier* (Super. Ct., Dist. of Columbia, March 19, 1974); *Hardware Mutual Casualty Co. v. Premo,* 153 Conn. 465, 217 A. 2d 698, 703 (1966)). The preference for a technical construction applies where a contrary intent is not indicated on the face of the statute (*Cameron v. Mullen,* 128 U.S. App. D.C. 235, 245, 287 F. 2d 193 [1967]).

Legislative omissions in criminal statutes can only be remedied by legislative action.* In our tripartite scheme of government, courts are not permitted to effectuate what appears to be the legislature's intent by extending the reach of a penal statute beyond its plain language. This fundamental principle has never been better expressed than by Chief Justice Marshall in *United States v. Wiltberger,* 5 Wheat. 76, 95-96, 5 L. Ed. 37 (1820):

*South Dakota recently amended its statute to avoid this problem. Section 39-17-44 (10) now states that "marijuana means all parts of any plant of the genus cannabis. . . ."

> The rule that penal laws are to be construed strictly, is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not the judicial department. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.

In *McBoyle v. United States,* 283 U.S. 25, 27 (1931), Justice Holmes noted that connection between the principles enunciated in *Wiltberger* and the constitutional requirement that penal statutes be drafted with specificity:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. Therefore criminal statutes should not be extended . . . simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used.

With the statutory construction applied by the Trial Court, as distinguished from apparently conflicting case

law above, it is clear that the final conclusion of the Trial Court as to the combined probative value of attested and inferred facts is erroneous and as such should be reversed.

II.

THE CLASSIFICATION OF MARIJUANA IN MINNESOTA STAT. §152.02 SUBD. 2 IS ARBITRARY AND IRRATIONAL BASED ON THE CRITERIA SET FORTH IN MINN. STAT. §152.02 SUBD. 7(1) AND THEREFORE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

The United States Supreme Court uses a two tier test to determine whether or not a state action, such as a state statute, violates the Equal Protection Clause. First, if the right curtailed by the legislation is a fundamental right or if the issue involves the restriction of political processes, or if the statute's classification is suspiciously aimed at discreet and insular minorities, then the statute is subject to strict judicial scrutiny. *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152-53 n. 4. If the statute receives strict scrutiny, the state must show a compelling governmental interest in establishing the specific statutory scheme in question, in order for the statute to be declared constitutional. It is not our contention that the Minnesota marijuana laws at issue here curtail a fundamental right or involve the political processes or aim at a discreet and insular minority. We therefore do not invoke the Court's strict judicial scrutiny of the statute.

If a statute is not given strict scrutiny, it is upheld if it is reasonable, not arbitrary, and bears a rational relationship to a permissible state objective. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). When a statute bears no rational relationship to a valid state objective, the statute violates the Equal Protection Clause and is therefore unconstitutional. For a statute to bear no rational relationship to a valid state objective, the statute's classification scheme must be arbitrarily and unreasonably overinclusive or underinclusive. *Reed v. Reed*, 404 U.S. 71 (1971); *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920). We contend that the Minnesota statute, specifically Minnesota statute §152.02, subd. 2, is overinclusive because marijuana is included therein. The same statute is underinclusive because alcohol and nicotine are excluded.

A minority of courts in other jurisdictions have held the classification of marijuana in Schedule I to be in violation of the Equal Protection Clause. Indeed, until the Supreme Court of Connecticut dealt a temporary setback, a growing trend of cases found such classification to be unconstitutional. That trend began with *People v. McCabe*, 49 Ill. 2d 338, 275 N.E. 2d 407 (1971), and continued with *People v. Sinclair*, 387 Mich. 91, 194 N.W. 2d 878 (1972), *English v. Miller*, 341 F. Supp. 714 (E.D. Va., 1972), *Sam v. State*, 500 P. 2d 291 (Okla. 1972), *People v. McGaha*, 10 Ill. App. 3d 1051, 295 N.E. 2d 477 (1973), *People v. Durfee*, 16 Ill. App. 3d 709, 306 N.E. 2d 693 (1974), and *State v. Anonymous* (1976-3), 32 Conn. Sup. 324, 355 A. 2d 732 (1976). Those courts which dealt thoroughly with the scientific literature in the area, especially *McCabe, Sinclair,* and *Anonymous,* were convinced that the classification of marijuana with narcotics is irrational, arbitrary and capricious.

The State, at the hearing on the motion in the instant case, relied heavily on *United States v. Kiffer,* 477 F. 2d 349 (2d Cir., 1973) to support its position that the classification of marijuana is reasonable. In fact, *Kiffer* is not even persuasive for the state's position. The factual basis for the decision in *Kiffer* was the court's finding four particular items: (1) that there existed no easily applied test to detect intoxicated drivers under the influence of marijuana, (2) that not enough was known about the difference between marijuana and hashish, (3) that no system of control existed to keep marijuana out of the hands of minors and (4) that knowledge as of 1973 about marijuana was marked by disagreement and controversy. The evidence in the instant case shows that none of these findings can be presently made. First, Professor Marc Kurzman, R. PH., J.D., the defense expert witness, testified on cross-examination that a "breathalyzer" exists to test for the intoxication of drivers using marijuana (T. 78). Further, a quick and inexpensive blood test for tetrahydrocannabinol (THC), the major psychoactive component of marijuana, has been developed by chemists at the University of Scranton (The U.S. Journal, April, 1977). Second, Professor Kurzman continually testified about dosage levels across the range of "Minnesota Green" marijuana (T. 75) to pure THC; the range explicitly included hashish (e.g. T. 112). It can no longer be said that there is insufficient knowledge about the differences between hashish and marijuana. Third, declaring the statute in violation of Equal Protection allows the development of one of the numerous systems already proposed for distributing marijuana. Such a system would keep marijuana out of the

hands of minors in ways similar to present systems regulating the distribution of alcohol and tobacco. Finally, the Reports of the Secretary of HEW to Congress on marijuana (T. 11-12) as well as the Consumer Union report (T. 15), both submitted to the trial court (T. 7-19, 70-73) portray the current lack of controversy on the subject. As objective treatments of the subject, these reports expose the arguments on the hazards of marijuana as the unscientific biases they are. Since the factual basis for the holding in *Kiffer* no longer exists, that case is not persuasive for the state's position concerning the scientific knowledge about marijuana.

The persuasiveness of *Kiffer* is further eroded by Judge Feinberg's footnote 11, 477 F. 2d at 354, wherein he notes the chronological trend toward the unconstitutionality of marijuana laws similar to Minnesota's. Thus, not only does *Kiffer* not support the state's position on the facts, it *does* support the Defendant's position that the trend of the law is towards the unconstitutionality of statutes similar to Minnesota's marijuana law.

The State, at the hearing on the motion in the instant case, also relied heavily on the Connecticut Supreme Court's reversal of *State v. Anonymous,* 32 Conn. Sup. 324, 355 S. 2d 732 (1976), reversed sub. nom. *State v. Rao,* 38 Connecticut Law Journal 12 (September 14, 1976). The *Rao* Court cites many cases for the proposition that the classification of marijuana is rational. Each of those cases is distinguishable on the basis of the outdated scientific knowledge used in the respective decisions. Some cases merely cite *Kiffer,* relying on the Second Circuit's obsolete scientific findings. *State v. Strong,* 245 N.W. 2d

277 (S. Dak., 1976). Others cite the more outdated scientific findings of *Commonwealth v. Leis,* 355 Mass. 189, 243 N.E. 2d 898 (1969). *State v. Kantner,* 53 Haw. 327, 493 P. 2d 306, *cert. den.* 409 U.S. 948 (1972), *State v. Nugent,* 125 N.J. Super. 528, 312 A. 2d 158 (1973). Others hold that only at the time the classification was passed was it rational. *U.S. v. Maiden,* 355 F. Supp. 743 (D. Conn., 1973), *People v. Summit,* 183 Colo. 421, 517 P. 2d 850 (1974), *State v. White,* 153 Mont. 193, 456 P. 2d 54 (1969), *U.S. v. Rodriguez-Camacho,* 468 F. 2d 1220 (9th Cir., 1972). *Maiden* is the leading case in this group and, most narrowly construed, stands for the proposition that at the time of its passage, the federal classification of marijuana (similar to Minnesota's) was rational enough to await new scientific findings. There is authority to support this narrow construction in a letter from the Department of Health, Education and Welfare to Rep. Harley Staggers, Chairman of the House Committee on Interstate and Foreign Commerce, 1970, U.S. Code Congressional and Administrative News 4629. The new scientific findings have been published. *See* 1975 Report from the Secretary of HEW to Congress on *Marijuana and Health,* hereinafter referred to as Marijuana Report. The final cases cited in *Rao, State v. Stock,* 463 S.W. 2d 889 (Mo., 1971), and *State v. Wadsworth,* 109 Ariz. 59, 505 P. 2d 230 (1973), upheld the classification on other grounds, merely assuming the alleged harmful effects of marijuana. None of these cases dealt with recent scientific writings.

None of these cases consider the criteria for the classification set forth in the statutes themselves. In this respect, the instant case is one of first impression. Minn. Stat. §152.02 sets forth five schedules of controlled substances. Subdivision 2 of that section lists Schedule I drugs, including marijuana. Minnesota Statute §152.02, Subd. 7(1) establishes the criteria by which a substance is included in Schedule I. Those criteria require that a chemical substance have a high potential for abuse, no currently accepted medical use in the United States, and a lack of accepted safety for use under medical supervision. If a substance does not meet all three criteria, it should not be included in Schedule I. If a substance does meet all three criteria, it must be included in Schedule I, particularly in light of the statute's phrasing: "The board of pharmacy *shall* place a substance in schedule I if . . ." Minnesota Statute §152.02 Subd. 7(1) (emphasis added).

Similarly, substances must be included in Schedule II if there *is* currently accepted medical use, but there is a high potential for abuse which may lead to severe psychological or physical dependency. Schedule III is the same, except that abuse may lead to *moderate or low* physical dependence or high psychological dependence. The testimony in the record of the hearing on defendant's motion in this case, as well as the recent scientific literature, clearly shows that (1) marijuana meets none of the criteria for inclusion in Schedules I, II, or III; and (2) other substances, to wit: alcohol and nicotine, do meet the criteria for inclusion, but are not so included. Since present scientific information clearly shows these facts, Schedule I is both overinclusive and underinclusive, and therefore violates the equal protection clause.

The uncontradicted testimony at the preliminary hearing in this case establishes conclusively that marijuana meets none of the three criteria for inclusion in Schedule I. Marijuana does not have a high potential for abuse. High potential for abuse was defined at the hearing as primarily physical dependency. Prof. Kurzman stated that marijuana users experience no withdrawal symptoms, and therefore no physiological dependence, when marijuana is deprived. (T. 56, Marijuana Report, p. 8) Other Schedule I narcotics, however, do cause such physiological dependence (T. 59). Similarly, alcohol and nicotine users suffer physiological withdrawal symptoms when deprived of the respective substances; indeed, it is common knowledge that alcoholics and cigarette smokers suffer adverse physical reactions to the deprivation of their respective drugs. *See* 1974 Report from the Secretary of HEW on Alcohol and Health, hereinafter Alcohol Report, p. 95. Psychological dependence, another aspect of abuse discussed at the hearing, is irrelevant as a classifying criterion because people may be psychologically dependent on a picture flashing onto a television screen when the switch is pushed, or on receiving a paycheck periodically. The inferences to be drawn are that (1) marijuana does not have a high potential for abuse as required for inclusion in Schedule I; and (2) alcohol and nicotine do have a high potential for abuse and therefore are wrongfully excluded from Schedule I.

The second criterion for including a substance in Schedule I is its lack of currently accepted medical use in the United States. Currently accepted medical use is defined as a substance's approval by the Food and Drug Administration for commercial preparation and marketing. Since marijuana is illegal to process, it is illegal to prepare and market, and it therefore cannot possibly receive approval by the F.D.A. (T. 80). If currently accepted medical use in the United States is defined as actual use by physicians for the treatment of mental and physical ills, then marijuana has a currently accepted medical use. It is used to treat epilepsy, glaucoma victims, (see *U.S. v. Randall,* 20 Cr. L. Rep. 2299 (1976)) and anorexia nervosa patients, (T. 53) as well as to ease the suffering of fatally ill people (see Marijuana Report, p. 8-9). Marijuana is also used in research by physicians at the Mayo Clinic. Alcohol, while it is still used as a sedative, is used sparingly by practitioners who prefer to prescribe other, more effective and efficient drugs. Nicotine, in the form inhaled from tobacco, has, since 1964, been shown to have harmful, not beneficial, results on humans. It therefore has no currently accepted use. The inferences to be drawn from this portion of the record are therefore that (1) marijuana will have F.D.A. approved medical use when it becomes legal to process and therefore presently does not meet the statutory criterion for inclusion in Schedule I, and (2) alcohol and nicotine are respectively disparaged and harmful in their effectiveness as medical aids, and therefore are wrongfully excluded from Schedule I.

The third criterion for inclusion in Schedule I is a substance's lack of accepted safety for use under medical supervision. The criterion was interpreted at the hearing to mean that, if prescribed, the substance could not be taken to an overdose which would lead to short term and/or long term health problems or death. Marijuana cannot

cause death (T. 65, Marijuana Report, p. 8) and was declared to have no impact on human organs, the brain, the production of white blood cells, the production of the male hormone testosterone, a person's psychological motivation, his aggressiveness, or his tendency to use harder, more dangerous substances (T. 42-49). The only significant impact of marijuana on the human being is a euphoric feeling, change in eye/muscle coordination and a change in the heart rate (T. 76). The Marijuana Report, p. 4, notes a quicker onset of chest pain with the use of marijuana by those who are already afflicted with heart disease. However, the report also notes "the contrasting finding that marijuana produces minimal changes in heart function in young healthy men," suggesting that marijuana does not cause heart disease in those not already afflicted. In comparison alcohol directly causes cardiomyopathy, Alcohol Report, p. 68, and may be linked to coronary attack in those who were former drinkers, but have stopped. Id. at 69. Similarly, cigarette smoking is clearly a cause of heart attack. HEW Report on the Health Consequences of Smoking, hereinafter referred to as Smoking Report, p. 1, 1974. In addition, both alcohol and cigarette smoking lead to death. *See* Alcohol Report, p. 79-91; Smoking Report, p. 1. Thus, the only theory by which marijuana meets the third criterion for inclusion in Schedule I is its effect on eye/muscle coordination. If this is a determinant factor, however, then all over-the-counter drugs with warnings not to drive because of drowsiness, must also be included in Schedule I. Alternatively, alcohol and tobacco both have significant short term and long term impacts on health. Because of these factors, the court may infer that

(1) marijuana is safely used under medical supervision and cannot be abused by overdose, and therefore should not be included in Schedule I; and (2) alcohol and nicotine are easily abused, in the rare instances in which they are even used under medical supervision.

Because marijuana does not meet any of the criteria for inclusion in Schedule I, and because alcohol and nicotine meet all three criteria for inclusion in Schedule I, the schedule is both overinclusive and underinclusive. The court need not reach each of the six factual conclusions argued above, however, to find the schedule in violation of Equal Protection. First, in order to find Schedule I overinclusive, the court must find that marijuana fails to meet any one of the three criteria for inclusion in Schedule I. If marijuana fails to meet any one of the criteria, it cannot be written into Schedule I. Second, the Court must find that the Schedule is either overinclusive or underinclusive. While it is the Defendant's contention that Schedule I is both overinclusive and underinclusive, the Court need only find, for example, that the Schedule is overinclusive. All the Court needs to find for overinclusiveness is, as mentioned, the failure of marijuana to meet just one of the three statutory criteria for inclusion in the Schedule. Therefore, if the Court finds either that marijuana does not cause physiological dependence or that marijuana does have currently accepted medical uses or that marijuana does not cause death by overdose, then the Court must find that the Schedule is overinclusive. Once the Court finds that the Schedule is overinclusive the Court must also find that the statute violates the Equal Protection Clause of the Fourteenth Amendment.

Similarly, the criteria for inclusion in Schedule II and III are not met. The evidence demonstrates conclusively that there is no potential for abuse of marijuana which would lead to severe, moderate or low physical or psychological dependence. On the other hand, both alcohol and nicotine have a high potential for physical dependence.

Because the classifications are both overinclusive and underinclusive the classification has no rational basis and therefore violates the equal protection clause of the Fourteenth Amendment. In order to reach such a conclusion, this Court should do what no other appellate court has done since *Kiffer*, and that is closely examine the recent scientific data in the area. In particular, it is worthwhile for the Court to ask whether any adverse conclusion concerning marijuana is any different for alcohol or nicotine. When the court finds no such difference, it must also find the classification of marijuana arbitrary and irrational.

CONCLUSION

Appellant's conviction must be reversed on either of two grounds: Having found as fact that the state's scientific evidence was insufficient to identify the substance involved as Cannabis, let alone as Cannabis Sativa L., the Court erred in using insupported inferences as to defendant's belief to support a finding as to the botonical identity of the substance. Moreover, the evidence adduced at the preliminary hearings establishes conclusively that the Minnesota statute is arbitrary and irrational by reason of both overclassification and underclassification, and is therefore unconstitutional.

For these reasons Appellant requests that his judgment of conviction be reversed.

Respectfully submitted,

JAMES H. MANAHAN
MARC G. KURZMAN
Attorneys for Appellant

Assisted by:
Ronald S. Goldser
Law Clerk
University of Minnesota Law School

ADDENDUM

STATUTES INVOLVED
(Minn. St. 152.01, 152.02, 152.09, 152.15)

152.01 *Definitions*

Subdivision 1. Words, terms, and phrases. Unless the language or context clearly indicates that a different meaning is intended, the following words, terms, and phrases, for the purposes of this chapter, shall be given the meanings subjoined to them.

Subd. 2. Drug. The term "drug" includes all medicines and preparations recognized in the United States pharmacopoeia or national formulary and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals.

Subd. 3. Administer. "Administer" means to deliver by, or pursuant to the lawful order of a practitioner a single dose of a controlled substance to a patient or research subject by injection, inhalation, ingestion, or by any other immediate means.

Subd. 4. Controlled substance. "Controlled substance" means a drug, substance, or immediate precursor in Schedules I through V of Minnesota Statutes, Section 152.02. The term shall not include distilled spirits, wine, malt beverages, intoxicating liquors or tobacco.

Subd. 5. Repealed by Laws 1971, c. 937, §22, eff. June 8, 1971.

Subd. 6. Pharmacist Intern. The term "pharmacist intern" means a natural person, a graduate of the college

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II which is a narcotic drug to a person under 18 years of age who is at least three years his junior is punishable by the fine authorized by section 152.15, subdivision 1, clause (1), by a term of imprisonment of up to twice that authorized by section 152.15, subdivision 1, clause (1), or by both. Any person 18 years of age or over who violates section 152.09, subdivision 1, by distributing any other controlled substance listed in Schedules I, II, III, IV, and V, except marijuana, to a person under 18 years of age who is at least three years his junior is punishable by the fine authorized by section 152.15, subdivision 1, clause (2), (3), or (4), by a term of imprisonment up to twice that authorized by section 152.15, subdivision 1, clauses (2), (3), or (4), or both.

Subd. 5. Any person convicted of a second or subsequent offense under Laws 1971, Chapter 937, except as provided in subdivision 1, clauses (1), (2), (3) and (5) may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

APPENDIX

STATE OF MINNESOTA
County of Olmsted

COUNTY COURT
Criminal Division

THE STATE OF MINNESOTA,

Plaintiff,

vs.

BOSTON PAUL VAIL,

Defendant.

COMPLAINT-WARRANT FOR FELONY OR GROSS MISDEMEANOR

District Court File No. 4350

COMPLAINT

The Complainant being duly sworn, makes complaint to the above-named Court and states that there is probable cause to believe that the above-named Defendant committed the offense described below. The Complainant states that the following facts establish PROBABLE CAUSE: Complainant is an Agent with the Minnesota Bureau of Criminal Apprehension, Narcotics Division. In negotiations with Mark William Rosasco, complainant purchased approximately 222 pounds of marijuana from the said Mark Rosasco on February 2, 1976. At one point in the negotiations the said Mark Rosasco stated he had to go get the marijuana from "Paul." Surveillance officers

observed the vehicle being driven by Rosasco going toward the home of Paul Vail; Rosasco returned to the scene of the negotiations and had the marijuana with him, at which time the sale was consummated. The said Mark Rosasco testified under oath before the Hon. O. Russell Olson, Judge of District Court, on May 10, 1976 that he had talked with Paul Vail prior to the date of the sale and made arrangements with Vail to pick up approximately 222 pounds of marijuana for sale to complainant, and did in fact go to Vail's home and Paul Vail showed him (Rosasco) where the marijuana was, Rosasco picked up the marijuana and returned to the scene of the negotiations and sold the approximately 222 pounds of marijuana to Gregory L. Sickler.

The above facts constitute the Complainant's basis for believing that the above-named Defendant, on or about the 2nd day of February, 1976, at Oronoco in the above-named County, committed the following described

OFFENSE

Charge: Sell, give away, barter, deliver, exchange or distribute controlled substance, felony in violation of Section: §152.01, Subd. 4, 9; 152.02, Subd. 2(3); 152.09, Subd. 1(1); 152.15, Subd. 1(2) and §609.05
Maximum Sentence: 5 years/$15,000.00

(Description)

Paul Vail, aided by Mark William Rosasco, did wrongfully and unlawfully sell, give away, barter, deliver, ex-

change, or distribute to one Gregory L. Sickler a controlled substance, to-wit: marijuana.
THEREFORE, Complainant requests that said Defendant, subject to bail or conditions of release where applicable,

(1) be arrested or that other lawful steps be taken to obtain Defendant's appearance in court; or

(2) be detained, if already in custody, pending further proceedings;

and that Defendant otherwise be dealt with according to law.

/s/ GREGORY L. SICKLER
Complainant

Being duly authorized to prosecute the offense charged,

Illegible
Prosecuting Attorney

hereby approves this Complaint.

RAYMOND F. SCHMITZ
Assistant County Attorney
Courthouse
Rochester, Mn.
Phone No. 285-8138

STATE OF MINNESOTA
County of Olmsted

IN DISTRICT COURT
Third Judicial District

STATE OF MINNESOTA,

Plaintiff,

vs.

BOSTON PAUL VAIL,

Defendant.

NOTICE OF MOTION AND MOTION

TO: Raymond Schmitz, Assistant County Attorney

YOU WILL PLEASE TAKE NOTICE that on Monday, August 16, 1976 at 1:00 p.m. at the Olmsted County Courthouse, Rochester, MN, Defendant will move the court for an order dismissing the Complaint herein on the ground that the laws under which Defendant is charged (Minn. Stat. 152.01, 152.02, 152.09, 152.15) are unconstitutional as they pertain to possession, sale or distribution of marijuana, on the ground that said laws arbitrarily and irrationally classify marijuana with far more dangerous drugs, in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. Said motion will be based upon the testimony of witnesses to be called by the parties, including Lester Grinspoon, Joel Fort, Edward Brecher, Thomas Ungerleider, John Finlattor and Robert DuPont, and upon all the files and proceedings herein.

Dated this 26th day of July, 1976.

/s/ JAMES H. MANAHAN
JAMES H. MANAHAN LAW OFFICE, CHARTERED
Suite 107, Madison East
Mankato, MN 56001
Phone No. 507-387-5661
Attorney for Defendant

(Title of Cause.)

ORDER

APPEARANCES:

D. P. MATTSON, Olmsted County Attorney, by RAYMOND SCHMITZ, Assistant County Attorney, Olmsted County Courthouse, Rochester, Minnesota, attorney for the plaintiff.

JAMES H. MANAHAN, of James H. Manahan Law Office, Suite 107, Madison East, Mankato, Minnesota, attorney for the defendant.

There has been scheduled before this Court for hearing for Monday, August 16, 1976 a motion on the constitutionality of Minn. Stat. 152.01 et seq relating to the illegality of possession and sale of marijuana; that constitutionality issue is presented by the defendant on the grounds of arbitrary and irrational classification with more dangerous drugs in violation of the Federal Constitution's Fourteenth Amendment Equal Protection clause.

The Court is in possession of a letter from the defense attorney dated July 26, 1976 asking for a continuance of the motion and a determination for a date of trial.

IT IS HEREBY ORDERED that the hearing on the motion for constitutionality of the statute and the presentation of any evidence, if any, with respect thereto shall be heard before the Court on Thursday, September 23, 1976 at 10:30 A.M. in Courtroom Number 1 before the undersigned at Rochester, Minnesota.

IT IS FURTHER ORDERED that parties may, if they wish, present evidence on direct by form of affidavit before that trial date so that the attorney in opposition may examine and determine whether or not he needs or wishes to cross-examine that affiant and therefore determine whether or not the parties submitting that testimony or that evidence on direct need produce that party at trial. Presentation by affidavit or by previous testimony and other proceedings may suffice in that respect.

IT IS FURTHER ORDERED that the trial of the main issues in the trial and to determine the guilt or innocence of the defendant will be heard on Monday, October 18, 1976 at 9:00 A.M.; the setting of this trial date is without prejudice with respect to the ruling on the motion above indicated submitted for hearing on September 23, 1976.

IT IS FURTHER ORDERED that the above dates for hearing are considered definite and certain and cannot and will not be changed except for cause shown to the Court upon notice to opposing parties.

Dated this fifth day of August, 1976.

BY THE COURT

/s/ O. RUSSELL OLSON
Judge of District Court

(Title of Cause.)

ORDER DENYING DEFENDANT'S MOTION AS TO CONSTITUTIONALITY OF STATUTE

(PROVISIONS IN CH. 152 MINN. LAWS)

File No. 4350

APPEARANCES:

D. P. MATTSON, County Attorney, by RAYMOND SCHMITZ, Assistant County Attorney, Olmsted County Courthouse, Rochester, Minnesota, Attorney for the Plaintiff.

JAMES H. MANAHAN, of James H. Manahan Law Office, Chartered, Suite 107, Madison East, Mankato, Minnesota, attorney for the defendant.

The defendant has filed a motion for hearing on August 16, 1976 which had been continued at the request of the defendant and with the consent of the State until the date of this hearing, September 23, 1976. The motion was for an order dismissing the complaint wherein the defendant is accused of violation of Ch. 152 relating to the possession of controlled substances and to dismiss said complaint on the grounds that the Minnesota Laws in Ch.

152 relating to the specific controlled substance, marijuana, are unconstitutional because they were allegedly arbitrary and they allegedly irrationally classify marijuana with far more dangerous drugs, all in violation of the Fourteenth Amendment of the United States Constitution and specifically the equal protection clause therein.

The Court heard the matter on September 23, 1976 and took testimony and heard arguments of counsel. Thereafter briefs were submitted by counsel under date of September 29, 1976, September 30, 1976 and October 4, 1976. The matter has been before the Court for disposition since approximately that date.

The Court having considered the matter, reviewed the evidence, heard the arguments of counsel and reviewed the applicable law, now enters the following order.

IT IS ORDERED that the defendant's motion is denied.

Dated this 12th day of October, 1976.

BY THE COURT

/s /O. RUSSELL OLSON
Judge of District Court

MEMORANDUM

I cannot find the Equal Protection Clause of the Fourteenth Amendment mandates unconstitutionality of the particular provision of Ch. 152 of Minnesota Laws (1975) classifying marijuana with other controlled substances.

And if so, I believe that decision is more properly made

by an appellate court than a trial court such as this one, absent some more clear appellate court decisions from other Federal or State jurisdictions (the Minnesota Supreme Court not having ruled on the issue).

Dated this 12th day of October, 1976.

BY THE COURT

/s/ O. RUSSELL OLSON
Judge of District Court

(Title of Cause.)

ORDER SETTING THE CASE FOR TRIAL BEFORE THE COURT WITHOUT A JURY

File No. 4350

APPEARANCES:

D. P. MATTSON, County Attorney, by RAYMOND SCHMITZ, Assistant County Attorney, Olmsted County Courthouse, Rochester, Minnesota, attorney for the plaintiff,

JAMES H. MANAHAN, of James H. Manahan Law Office, Chartered, Suite 107, Madison East, Mankato, Minnesota, attorney for the defendant.

The defendant on September 27, 1976 through counsel Manahan having signed and filed a written waiver of a jury trial and the defendant with counsel on September 23, 1976 having advised the Court orally of his desire to waive a jury trial, and the Court having reviewed the ap-

plicable law and the applicable Standards for Criminal Justice, Trial by Jury and the Minnesota Rules of Criminal Procedure in Rule 26 (para. 1.2(a)) now enters the following order.

IT IS ORDERED that the request by the defendant for a waiver of a jury trial and for trial before the Court is granted.

IT IS FURTHER ORDERED that the case is set for trial on the same date as the original jury trial was scheduled; namely Monday, Ortober 18, 1976.

IT IS FURTHER ORDERED that the case is set for trial then for trial before the Court without a jury before the undersigned Judge, O. Russell Olson.

Dated this 12th day of October, 1976.

BY THE COURT

/s/ O. RUSSELL OLSON
Judge of District Court

MEMORANDUM

See (a) *State v. Kilburn* (1975) — Minn. —, 231 NW2d 61 (including dissenting and concurring opinions);

(2) A.B.A. *Standards for Criminal Justice,* Trial by Jury, par 1.2(a), (1968 approved draft) and comments therein;

(3) Minnesota Rules of Criminal Procedure (adopted 1975)

(4) *State v. Gaulke* (1971) 289 Minn. 354, 184 NW2d 599;

(5) *State v. Hoskins* (1972) 292 Minn. 111, 193 NW2d 802;

(6) *State v. Boyce* (1969) 284 Minn. 242, 170 NW2d 104; and

(7) *Singer v. U.S.* (1964) 380 U.S. 24, 85 S.Ct. 783.

Dated this 12th day of October, 1976.

BY THE COURT

/s/ O. RUSSELL OLSON
Judge of District Court

(Title of Cause.)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DETERMINATION OF GUILT

File No. 4350

APPEARANCES:

RAYMOND F. SCHMITZ, Assistant County Attorney, for D. P. Mattson, Olmsted County Attorney, Rochester, Minnesota, appeared on behalf of the plaintiff; and

JAMES H. MANAHAN, of James H. Manahan Law Office, Chartered, Suite 107, Madison East, Mankato, Minnesota, appeared on behalf of the defendant.

The above entitled matter was tried before the Court without a jury, the Defendant having waived the jury in open court, on October 18 and 19. Thereafter the Court took the case under advisement giving the parties an opportunity to submit legal briefs and memorandums. Those were submitted under date of October 26 and November 5. The matter has been before the Court for disposition since that date.

The Court has reviewed the applicable law, the evidence submitted in the case, the legal memorandums submitted by the parties, and some related literature in the field relating to identification of scientific substances, and the Court now enters the following Findings of Fact, Conclusions of Law, and Determination of Guilt.

FINDINGS OF FACT

I.

On the 2nd day of February, 1976, in Olmsted County at or near the village of Oronoco the Defendant, Boston Paul Vail, did aid Mark William Rosasco in selling and delivering a controlled substance; namely, marijuana, in violation of Minnesota Statutes §152.01, Subd. 4, 9; and 152.02, Subd. 2(3); 152.09, Subd. 1(1); 152.15, Subd. 1(2); and 609.05.

II.

That said act of sale did occur wrongfully and unlawfully and feloniously contrary to the law of the State of Minnesota.

CONCLUSIONS OF LAW

I.

The Defendant is guilty of the crime of selling a controlled substance, in violation of Minnesota Law, said crime being a felony for which the maximum penalty is five years in prison or a $15,000 fine or both.

IT IS ORDERED that the Defendant appear before the Court at the following time and date for the purpose of disposition and sentencing; Friday, December 10, 1976, at 2:00 p.m.

Let the memorandum attached hereto be incorporated by reference.

IT IS FURTHER ORDERED that the period of time elapsed from November 8, 1976, to the date of disposition shall be credited on any sentence that may be imposed.

Dated this 7th day of December, 1976.

BY THE COURT

/s/ O. RUSSELL OLSON
Judge of District Court

(Title of Cause.)

MEMORANDUM

FILE NO. 4350

APPEARANCES:

RAYMOND F. SCHMITZ, Assistant County Attorney, Olmstead County Courthouse, Rochester, Minnesota, attorney for the plaintiff.

JAMES H. MANAHAN, of James H. Manahan Law Office, Chartered, Suite 107, Madison East, Mankato, Minnesota, attorney for the defendant.

I.

IDENTIFICATION OF THE SUBSTANCE SOLD BY SCIENTIFIC TESTING

This Defendant was charged with possession of a controlled substance with the intent to sell. The controlled substance is declared illegal by our Statute. The particular controlled substance is marijuana.

Marijuana is defined as Cannabis sativa L. Therefore in order to convict somebody of the possession of a substance it is necessary to prove, presumably by proof beyond a reasonable doubt, that the substance in fact is contraband in this case, and therefore Cannabis sativa L.

It is not enough under Minnesota Law to prove that a Defendant "believed" the substance was marijuana; there must be proof that the substance in fact was that. There apparently are some states in which the belief that the product is contraband is the basis for some type of criminal wrong; Minnesota is not one of those states. (This is a different issue from accusing a certain defendant of possession of a substance when in fact he honestly believes it is something else; there of course the belief goes to the matter of knowledge of whether or not the substance is or isn't a controlled substance or contraband; we are not concerned with that issue here.)

In this case the State has attempted to prove the two hundred pounds of vegetable matter to be marijuana, that is Cannabis sativa L., by presenting to the Court the results of a three-prong test that was made by the analyst from the B.C.A. Laboratory. That person being identified as Anne Rummell, a crime lab analyst of the Bureau of Criminal Apprehension for the State of Minnesota, who has apparently been employed there for a period of two years; she has a major in biology and a minor in chemistry and has a baccalaureate degree (B.A. degree from Anderson College Indiana with some post-graduate work at Indiana University.)

The three-prong test is essentially as follows:

A. A microscopic examination of the plant material from a botanical point of view.

B. A Duquenois-Levine color test, which is apparently not a test scientifically termed for "identification," but rather is a "screen" test.

C. Thin-layer chromatography, which is also a screening test but not scientifically an identification test.

The position apparently of the State is that a combination of the three tests means that the product has run through three different screening tests and what comes out in the end is reasonably close to an identification of the substance and constitutes proof beyond a reasonable doubt that the vegetable matter was in fact the marijuana, the possession of which for sale purposes is forbidden under our law.

The defendants in this case have submitted testimony and persuasive arguments to the effect that the combination of the screening tests in this particular case, and the combination of screening tests in general, does not afford the kind of identification that is needed in the criminal law and does not amount to a proof beyond a reasonable doubt that the substance is the substance declared to be the controlled substance.

I have listened to this testimony for more than a half a day. I have reviewed some of the literature and the law on the subject, and I am persuaded, that at least in a

case where there is possession of a controlled substance *with the intent to sell,* that the identification procedures are probably inadequate. My reasoning includes the following considerations:

(1) When the original prohibitions against marijuana were enacted on the Federal level and in most states in the late 1930s, there was some knowledge, but not extensive knowledge, to indicate that all Cannabis was not of one species. The Federal decisions in the intervening period between 1938 and the present time seem to be grounded on the state of the knowledge then prevailing which was that Cannabis was pretty much synonymous with Cannabis sativa L. (even though there was some knowledge at the time that there may be more than one species.)

The Minnesota Statute, which has been more recently enacted in 1971, occurred at a time when the scientific knowledge with respect to whether there was more than one species of Cannabis led most scientists to the conclusion that there was more than one species and probably the following three species: Cannabis sativa L., Cannabis ruderalis, and Cannabis indica.

I believe the evaluation of the Minnesota Law has to be considered in light of the knowledge in the scientific community when the Minnesota Statute was enacted in 1971 rather than the scientific knowledge which was known to the com-

munity in 1938 when the Federal Statute was enacted.

The Minnesota Statute still uses the term Cannabis sativa L. rather than simply Cannabis; therefore, I conclude that the Minnesota Statute seems to make illegal the possession of the one form of Cannabis and probably not make illegal possession of the other two species Cannabis ruderalis and Cannabis indica.

I'm aware that this is an area of not total unanimity in the scientific community, but I think the doubts on the matter must be resolved in favor of the defendant. This is not to say that Cannabis ruderalis or Cannabis indica does not contain tetrahydrocannabinols (TCH), of course.

This is of course simply an issue of whether Cannabis is polytypic or monotypic. It is interesting to note in this respect that one of the scientists who has studied this matter and presented a paper on it in the scientific community; namely, Schultes, in 1970 gave as his judgment that Cannabis was monotypic; however, by 1974 he changed his mind and indicated that he then believed the best judgment was that it was polytypic.

(2) Secondly, one of the difficulties of drawing the conclusion that the term Cannabis sativa L. should be considered a generic term synonomous with Cannabis is at least a consideration of the fact that some studies indicate (apparently one

being Small and Beckstad) that not all Cannabis plants have produced THC in any measurable quantity; whether this means there was no THC or none actually measurable may be nitpicking, but in either case it is a factor that, it seems to me, Courts must face if they're to make the jump in reasoning and conclude that the legislators intended to not limit the contraband plant to Cannabis sativa L. but intended to use it as a more generic term.

I find it difficult and impossible to make that jump in reasoning in a criminal case where logically the proofs should be in identification by something more than simple probability.

(3) The Duquenois-Levine test is only a screening test that apparently is not specific for marijuana. apparently in the 1960s this test was considered somewhat specific in the scientific community, but at least in the last four, five years it's become recognized to be less and less so; coupled with the fact that there apparently are tests (a visible spectrophotometer) that can be utilized in the scientific community. It seems doubtful that it is necessary to treat the Duquenois-Levine test as anything more than what apparently it is; namely, a screening test and not a specific test.

(4) It is apparent to the Court that the presence of certain products in vegetable or leafy matter will pass the Duquenois test.

For example, Sucrets give the violet color for the test; pine wood product, Pinosylvin, and equol (from horse urine) "are other examples of resorcinols which contain at least part of the structural features required for a positive Duquenois test," presumably there may be others.

Backed with scientific testimony which we have in this case that is clearly more competent than that offered by the State, it seems doubtful that this Court can rely on those tests in such a circumstance alleging felonious criminal wrong.

(5) It appears the thin-chromatography is like gas chromatography, essentially a screening test, and chromatographic methods were not designed and not intended to be used as methods of chemical identification but as screening; as Dr. Kurzman indicates in his writings and testimony, it is probably true that you can prove "What compound is not with chromatography, but you can't prove what it is." In short, chromatography is a means of separation and screening but not of identification.

(6) There is a method of scientific analysis which will do an adequate job probably and pass muster of identification by a proof beyond a reasonable doubt. Probably that is microscopic analysis combined with gas chromatography-mass spectroscopy if properly used; that type of analysis would be fast and specific for a practical identification and definition, and this is apparently true even if

the sample is not homogeneous (i.e., one plant) or even contaminated with added chemicals.

Since the capability is there, it seems doubtful that the Court should be satisfied with less in a felonious criminal case. This Trial Court finds it doubtful that we in the judiciary would be satisfied with anything less in a straight, ordinary civil litigation case if liability rested upon the determinant of the genuiness of the contraband or the poison or the infectious material.

(7) This Court is mindful of the fact that in paternity cases, at least to date, we have not allowed the blood sample testing to be used as a basis for determining that a particular defendant is a father when he passes the screening tests for the blood sample; all we do is determine eligibility from the blood sampling, which is done, and it is much more sophisticated now than it was ten, fifteen years ago when the scientists relied only on blood type. Now there are various ingredients in the blood which are considered including protein content and so forth I understand; nevertheless, the blood sample is essentially a screening to determine whether the defendant qualifies as a member of the group of eligible fathers, but we do not in the civil cases still find that passing the blood test is sufficient to identify the defendant as the father of the child.

That is civil litigation, and I think that the proofs in a criminal case should be more stringent and of a higher standard than in a civil litigation.

II.

INFERENCES IDENTIFYING THE SUBSTANCE FROM NONSCIENTIFIC EVIDENCE

While this Court does not find the scientific analysis of the substance using the three-prong test as sufficient basis to identify it as Cannabis sativa L., and therefore, marijuana, the question still remains can the test or tests be admissible (even though not specific for marijuana) and used along with other evidence in order to identify the substance.

The Wisconsin Court in State vs. Wind in 1973 in an opinion written by Chief Justice Hallows—Wisc.—208 N.W. 2nd 357, faced this question and this issue specifically. In essence the Wisconsin Court held that the test while not specific for marijuana was probative and could be considered with other evidence in a sale case as distinguished from a possession case.

I quote specifically from Page 361 of the North Western Reporter where the Chief Justice rejects the argument of the prosecution claiming that the screening tests are sufficient where there is "no evidence that the weed was anything other than marijuana."

The Wisconsin Court rejects that argument and states in part as follows:

"We did not hold (in a previous case cited by the prosecution) that any evidence was sufficient to prove a substance was marijuana in the absence of evidence on the part of the defense that it was something else. The prosecution has the burden of proving beyond a reasonable doubt the substance is marijuana. However, we do not believe that the test need be specific for marijuana in order to be probative. An expert opinion that the substance is probably marijuana even if the test used is not exclusive is probative and admissible, but standing alone is not sufficient to meet the burden of proving the identity of the substance beyond a reasonable doubt. *If this were a possession case, the tests would be insufficient.* But here, we have other facts which particularize and support the opinion of the expert: namely, the police officer asked for marijuana, and Wind agreed to sell marijuana and charged a price which would indicate it was marijuana. These facts are sufficient with the expert opinion to meet the standard of sufficiency under the 'beyond a reasonable doubt' test."

In this case too this Court is mindful of certain facts other than and in addition to the screening test and makes the finding that it's probative on the identification of the substance. Those considerations are the following:

1. The amount of the sale amounting to 220 pounds.
2. The sale price amounting to $120 per pound.
3. The statement of the Defendant Vail quoted by the State's witness Mr. Rosasco identifying the product

as not only marijuana, but identifying the product as "Mexican grade" marijuana.

4. The inferred fact, which this Court makes, that a seller of a product containing 220 pounds is probably sophisticated and competent and alert enough to have made his own tests before he himself bought the product for presumably a considerable sum of money from his supplier. Whether that task was simply smoking the product in order to test the substance or whether the product was otherwise analyzed is, of course, unknown to the Court.

   But this Court does make the inference that in a sale of such a quantity that the sophistication and circumstance of the seller can be relied upon as a basis of inferring that he had not been "fooled" when he purchased it from his supplier.

   I do not think that kind of an inference can necessarily be made in a significantly smaller sale and in a situation where the participants are obviously more amateurish and less commercialized in the role that he or they play.

   I am aware of the arguments that can be made that even in the most scientific of tests, particularly in the area of prescribing analgesics and pain killers, the psychological factor weighs and thus the sensation created in the individual who consumes the product may not be entirely reliable.

   We are aware that control tests have been made

to indicate that if people consume a sugar pill, but they consume it believing it is darvon or aspirin or something, they will in fact get the pain relief in significant majority of the cases that they have been accustomed to getting with the aspirin or the pain pill.

I don't believe, however, that that psychological factor is necessarily present in the case of a commercial seller as it might very well be with an amateur marijuana user.

A person who is selling 220 pounds of marijuana may very well be a skeptical analyst when he tests the product he is buying, and the psychological factor that may be present in the amateur's case or that is present in the so-called pain killer and analgesic control test situations is not applicable.

For the reasons indicated then this Court has concluded that the three-prong screening test while inadequate for identification is admissible and probative and when combined with the other facts, some of which are inferred, do produce a finding that the Defendant did sell the controlled substance; namely, marijuana; namely; Cannabis sativa L., in violation of the Minnesota Statute, and that he is guilty.

Dated this 7th day of December, 1976.

BY THE COURT

/s/ O. RUSSELL OLSON
Judge of District Court

The Court attaches to this Memorandum the article entitled "The identification and misidentification of marijuana" written by Dr. Dwight S. Fullerton, PH.D., R.PH. and Marc G. Kurzman, R.PH., J.D., which article is essentially that of and consistent with that of the testimony of Dr. Kurzman at trial.

This particular article appeared in a law quarterly called "Contemporary Drug Problems" and published in the autumn of 1974.

Dated this 7th day of December, 1976.

BY THE COURT

/s/ O. RUSSELL OLSON
Judge of District Court

THE IDENTIFICATION AND MISIDENTIFICATION OF MARIJUANA

By Dwight S. Fullerton, PH.D., R.PH. and Marc G. Kurzman, R.PH., J.D.

Dr. Fullerton is Assistant Professor of Medicinal Chemistry at the College of Pharmacy, University of Minnesota, Minneapolis. Dr. Kurzman, a practicing attorney, is Associate Director of the Drug Information and Education Program and a member of the faculty of the College of Pharmacy at the University of Minnesota, Minneapolis.

In 1972, there were 292,179 people arrested in the United States for crimes involving marijuana. In 1973, marijuana arrests numbered 420,700, or 43% more than the previous year; they represent two-thirds of the total arrests for all drug-related offenses.[1] During 1974, over 500,000 people will be arrested for possession of marijuana. Assuming all of them were lawfully arrested and/or searched, and that they had the requisite intent and knowledge—can they be acquitted? The answer, with the present statutory definitions of "marijuana" (*as Cannabis sativa L.)*[2] and with the analytical tests employed by most forensic/analytical laboratories (microscopic examination, Duquenois-Levine color test, thin-layer or gas chromatography) is unequivocally—yes!

Unfortunately, in the overwhelming majority of cases involving marijuana, defense attorneys either stipulate to the identifiction of the alleged marijuana, or provide no

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AUTHOR'S NOTE: *We would like to thank our associates, Neal Comer, Esq. and Mary King, and our Administrative Secretary, Jan Lovick, for their critical review and help in final preparation of the manuscript.*

SOME PAGES WERE SKIPPED

R. A. DeZeevw and A. H. Whitte, "Identification of Cannabivarins in Hashish by a New Method of Combined Gas Chromatography and Mass Spectroscopy," *Clinical Chemistry Acta, 34,* 365 (1971); T. B. Vree, C. A. M. Van Cinneken, J. M. Van Rossen, and R. A. DeZeevw, "Identification in Hashish of THC, Cannabidiol and Cannabinol Analogues with a Methyl Side Chain," *J. Pharmacy and Pharmacology, 24,* 7 (1972); C. E. Costello, H. S. Hertz, T. Sakai and K. Biemann, "Routine Use of A Flexible Gas Chromatography—Mass Spectroscopy—Computer System to Identify Drugs," *Clinical Chemistry, 20,* 255 (1974); and R. Saferstein, J. M. Chao and J. Manura, "Identification of Drugs by Chemical Ionization Mass Spectroscopy," *J. Forensic Sciences, 19,* 463 (1974).

[171]See note 101, *supra.*

[172]See note 101, *supra.*

[173]For example, see note 14, *supra.*

[174]See note 7, *supra.*

[175]It is difficult to assess at this time, whether the case was lost because these complicated issues were presented to a jury or whether other factors attendant to the case were responsible for the guilty verdict.

[176]See State of Missouri v. Gilmore, note 109, *supra.*

[177]The following scientists provided the authors with critical evaluation of the manuscript and had important input into this work: Professor M. M. Abdel-Monem, University of Minnesota; Professor Ernst C. Abbe, University of Minnesota; Professor Loran C. Anderson, Florida State University; Professor George Constantine, Oregon State University; Professor William A. Emboden, Los Angeles Museum of Natural History; Dr. Steven A. Fike, United States Custom Laboratories; Dr. William M. Klein, Missouri Botanical Gardens; Professor John L. Neumeyer, Northeastern University; Professor Gerald B. Ownbey, University of Minnesota; Professor Richad E. Schultes, Harvard Univesity; Dr. Ernest Small, Ottawa Department of Agriculture; Professor E. John Staba, University of Minnesota; and Dr. Bruce E. Ratcliffe, Phar. Chem. Research Foundation.

January 30, 1975

Enclosed is a reprint of our paper on the identification of marijuana.

Please note that there is an error on page 316, line 3: "multicellular" should read "unicellular."

With regard to the discussion on pages 326-7 on identification procedures of greater specificity, it should be emphasized that infrared spectra are *just* as accurate as mass spectra for identification purposes. Virtually all minimally-equipped analytical laboratories have (or should have) an infrared spectrophotometer, so the purchase of an expensive mass spectrophotometer is not necessary. However, for laboratories doing significant numbers of analyses per year, the "per sample cost" of a mass spectrophotometer is quite low ($2—$4 per sample). In brief, if a laboratory has an infrared spectrophotometer, they can and should be using it for THC identification, even if they cannot afford a mass spectrophotometer.

Several readers have asked about more information for States where the so-called "minimum quantity concept (for intoxication)" applies. First, some information about Small's 350 plants, 117 of which contained "nil" THC (Note 54). The limit of THC that Small measured was 0.01%. . . . and any THC less than that was "nil" . . . i.e., not measurable by Small. (Other instruments could be used to go to smaller amounts, but less than 0.01% in a practical forensic sense is certainly "none" or "nil." This corresponds to 0.1 mg. THC in a 1000 mg. cigarette, for example . . . or 0.01 mg. in a routinely-analyzed 100

mg. forensic sample. This trace amount is certainly in the range of possible contamination from other samples in the laboratory or law enforcement agency. The question of what is "none" is further discussed in our paper.) Also, it should be noted that up to 7 plants from each plant stock were actually grown in Small's experiments, or over 1000 plants in total.

By comparison, the minimum THC doses (by smoking) to cause any *slight* intoxication is about 2.0 to 5.0 mg. (See Neymeyer, note 10). Finally, Turk et al (note 151) have found the sensitivity of the Duquenois test to be 0.003 mg. (3ug.) and tlc to be 0.00005 mg. (0.05 ug.).

If you have any other questions, we can be reached at 612-376-3006 (Fullerton) and 612-376-3150 (Kurzman).

Sincerely,

/s/ D. S. (Pete) Fullerton, Ph.D., R.Ph.
/s/ Marc G. Kurzman, R.Ph., J.D.

(Title of Cause.)

NOTICE OF APPEAL

File No. 4350

Defendant, Boston Paul Vail, hereby appeals to the Supreme Court of the State of Minnesota from the judgment of conviction of the District Court of Olmsted County dated December 7, 1976, said judgment having been filed and imposition of sentence having been stayed on December 14, 1976.

Dated: December 20, 1976.

/s/ JAMES H. MANAHAN
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STATE OF MINNESOTA
IN SUPREME COURT

47427

STATE OF MINNESOTA,
Plaintiff-Respondent,

vs.

PAUL VAIL, a/k/a BOSTON PAUL VAIL,
Defendant-Appellant.

NOTICE OF REVIEW

TO: APPELLANT and his attorney, JAMES H. MANAHAN, ESQ., Suite 107, Madison East, Mankato, Minnesota.

Please take notice that pursuant to Minn. R. Civ. App. P. 106 respondent, State of Minnesota, will seek review of the Findings of Fact, Conclusions of Law and Determination of Guilt entered by the Honorable O. Russell Ol-

son, District Court Judge, on or about the 7th day of December, 1976, in the above-captioned matter.

Dated: January 18, 1977.

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47427

STATE OF MINNESOTA
In Supreme Court

STATE OF MINNESOTA,

Respondent,

vs.

BOSTON PAUL VAIL,

Appellant.

RESPONDENT'S BRIEF

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STATE OF MINNESOTA,

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vs.

BOSTON PAUL VAIL,

Appellant.

RESPONDENT'S BRIEF

LEGAL ISSUES

1. Was there sufficient evidence to support, beyond a reasonable doubt the trial court's finding that appellant was guilty of the possession of marijuana, a controlled substance?

The trial court held: In the affirmative.

2. Is the classification of marijuana, pursuant to Minn. Stat. § 152.02 subd. 2 (1974), as a Schedule I controlled substance an unconstitutional denial of equal protection?

The trial court held: In the negative.

PROCEDURAL HISTORY

Respondent accepts appellant's statement of the procedural history.

STATEMENT OF THE CASE

Appellant appeals from his December 7, 1976 conviction for sale of a controlled substance—marijuana—in violation of Minn. Stat. §§ 152.02 subd. 2, 152.09 subd. 1(1), 152.15 subd. 1(2) (1974).

STATEMENT OF FACTS

The essential facts of the transaction leading to appellant's arrest are not disputed here and can, therefore, be simply stated. In January of 1976 Greg Sickler, an agent with the Minnesota Bureau of Criminal Apprehension, became acquainted with Mark Rosasco, a 19-year-old resident of St. Cloud, Minnesota (T. 6, 7, 63, 64).[1] The two men had a conversation concerning marijuana and Rosasco indicated that he could obtain over 200 pounds of marijuana for Sickler to purchase at a price of $115.00 per pound (T. 64, 66).

Plans for the purchase were finalized in a series of phone calls from Sickler to Rosasco in his St. Cloud home during the evening of February 1, 1976 (T. 66, 67). As offers and counteroffers and arrangements for the exchange were made, Rosasco found it repeatedly necessary to discontinue talks in order to telephone an individual identified as "Paul" (T. 69-72). Rosasco testified and telephone company records confirmed that those phone calls were made to Rosasco's brother-in-law Boston Paul Vail, the appellant (T. 20, 23, 24, 30, 54, 113-120, 161-162).

[1] "T." indicates the transcript of the court trial before District Court Judge O. Russell Olson on October 18 and 19, 1976.

As a result of the telphone calls, plans were finalized and on the next day Rosasco drove to Oronoco in Olmsted County with Sickler following in another car (T. 72). They arrived at the Oronoco Municipal Liquor Store at about 1:10 p.m. on February 2, 1976 and Sickler stayed there while Rosasco went to get the marijuana (T. 73-74). Rosasco picked appellant up at his house and they drove to a farm owned by Richard Herron (T. 37, 38). Rosasco told appellant that he had seen half of Sickler's money and that he needed about 225 pounds of marijuana (T. 36, 37). Appellant indicated that he had that much Mexican grade marijuana available at the farm (T. 36, 51-52).

At the farm appellant took Rosasco to the basement and the two of them weighed out 225 pounds of marijuana on a large portable scale and packaged it in eight individual packages (T. 40-41, 42, 76-77). At this time Rosasco observed the contraband and satisfied himself that it was, in fact, marijuana (T. 42). Rosasco helped appellant load the marijuana into the car trunk and arrangements were made for Rosasco to contact appellant as soon as he received payment from Sickler (T. 43, 44). Appellant was to realize $100.00 per pound from the sale (T. 44).

Rosasco returned to the liquor store at about 4:25 p.m. and was arrested by Sickler (T. 74-75). Subsequently, appellant too was arrested and tried. At trial an expert analyst from the Bureau of Criminal Apprehension laboratory testified that she had run three tests on the contraband—a microscopic examination, a Duquenois-Levine examination, and thin layer

chromatography (T. 215, 225). All three tests as well as her visual examination and her experience in testing for marijuana led to and confirmed her opinion that the 225 pounds of contraband sold to Sickler by appellant and Rosasco was indeed marijuana (T. 222-223, 230, 244, 247, 264).

Since the trial was to the court, the court made findings as required by Minn. R. Crim. P. 26.01 subd. 2.[2] The court found appellant guilty of the sale of a controlled substance (A-13). It reasoned that although it did not feel that the tests performed by the state's expert were sufficient in themselves to identify the material sold by appellant as marijuana, those tests were nevertheless probative and admissible; and when they were considered in combination with the facts surrounding the actual sale, sufficient evidence existed to establish beyond a reasonable doubt that the material was marijuana (A-22 to A-25).

On December 14, 1976, appellant appeared before the court for sentencing (S. 1.)[3] However, appellant was continued on bail pending the outcome of this appeal and on the face of the record it appears that no sentence was actually imposed (S. 3, 10). Appellant now seeks reversal of his conviction, challenging the sufficiency of the evidence against him and asserting that marijuana is unconstitutionally classified as a Schedule I drug.

[2] The court's Findings of Fact, Conclusions of Law, and Determination of Guilt, dated December 7, 1976 is reproduced in full in the Appendix to Appellant's Brief beginning at p. A-12. Page references herein are to that Appendix.

[3] "S." indicates the transcript of the sentencing hearing held before District Court Judge O. Russell Olson on December 14, 1976.

ARGUMENT

I. THERE WAS SUFFICIENT EVIDENCE FOR THE TRIAL COURT TO FIND BEYOND A REASONABLE DOUBT THAT APPELLANT WAS GUILTY OF SELLING MARIJUANA, A CONTROLLED SUBSTANCE.

A. The Burden on Appeal

Appellant does not argue on appeal that there was not sufficient evidence to support the trial court's finding that on February 2, 1976 he sold in excess of 200 pounds of a green leafy substance to an undercover agent of the Bureau of Criminal Apprehension at a price of $115.00 per pound. Rather, the straw he grasps at is an argument that the court's finding that the substance he sold was marijuana was not supported by the evidence.

In advancing this argument appellant faces a heavy burden. To uphold the conviction this Court need only find that under the evidence the fact finder could reasonably have found appellant guilty of the offense charged. *State v. Whelan,* 291 Minn. 83, 189 N.W.2d 170 (1971); *State v. Norgaard,* 272 Minn. 48, 136 N.W.2d 628 (1965). To make this determination this Court views the evidence in the light most favorable to the state, assuming the state's witnesses were believed whenever their testimony was contradicted by appellant's witnesses. *State v. Combs,* 292 Minn. 317, 195 N.W.2d 176 (1972); *State v. Darrow,* 287 Minn. 230, 178 N.W.2d 778 (1970); *State v. Thompson,* 273 Minn. 1, 139 N.W.2d 490, *cert. denied,* 385 U.S. 817 (1966).

The trial court's findings are entitled to great weight on appeal and will not be reversed unless they are manifestly contrary to the evidence presented at trial. *State v. McCabe,* 251 Minn. 212, 87 N.W.2d 360 (1957). In fact, it has been held that the verdict will be sustained if it is possible to do so under any theory of the evidence. *State v. Stevens,* 248 Minn. 309, 80 N.W.2d 22 (1956). Even when this Court does not agree with the verdict below, it will not overturn that verdict unless it is not reasonably supported by the evidence. *See Preferred Risk Mutual Ins. Co. v. Anderson,* 277 Minn. 342, 152 N.W.2d 476 (1967); *Posselt v. Posselt,* 271 Minn. 575, 136 N.W.2d 659 (1965).

Appellant has not overcome the burden set upon him by law. The trial court made specific and detailed findings of fact and law. That court was the sole judge of the reliability of the defense witnesses. Its decision was within the evidence and does not supply grounds for reversal.

B. The Evidence

The large bulk of appellant's argument presents the now widely discredited theory that the criminal statutes on marijuana outlaw the sale of only *Cannabis sativa L.,* and that here there was no proof that the marijuana was not of another alleged species and therefore not proscribed.[4] Appellant treats more summarily his assertion that the court erred in relying in part on nonscientific evidence in determining that he was guilty of selling marijuana. In fact he cites but one case, *State v. Dick,* —— Minn. ——, 253 N.W.2d 277 (1977), and he does that only in an attempt to distinguish the facts of that case from the facts here.

[4] This argument is dealt with in full in section IC, *infra.*

The evidence which appellant relies upon in challenging his conviction is testimony elicited from the state's expert witness by appellant's attorney, Marc G. Kurzman, and additional "expert" testimony provided by Mr. Kurzman himself when he took the stand on his client's behalf (T. 272-312, 316-317, 339-388).[5]

After the expert evidence had all been heard the court found that it was not satisfied beyond a reasonable doubt *on the sole basis of the three identification tests conducted by the state's expert* that the contraband sold by appellant was marijuana (A-16 to A-17, A-22 to A-25). However, the court did find that the evidence concerning the tests was admissible and, when considered together with the other relevant circumstances of the crime, dictated a finding that appellant did, in fact, possess marijuana.

This conclusion is strongly supported by the very case appellant attempts to distinguish. In *State v. Dick,* —— Minn. ——, 253 N.W.2d 277 (1977), as here, the state's expert testified that he had conducted a microscopic examination and run a Duquenois-Levine test and was of the opinion that the substance in question was marijuana. The defense expert testified, just as appellant's attorney did, that he hadn't tested the substance in question but that the tests used by the state were inadequate to identify marijuana. The jury convicted and this Court upheld the conviction, noting that the jury also had before it relevant and probative, nonscientific evidence in the form of testimony that the defendant had represented the

[5] Mr. Kurzman also testified as a witness and argued motions as an attorney during pretrial proceedings. In light of his dual role it is questionable how much weight should be attributed to his testimony. *See* Code of Professional Responsibility, DR-5-102.

material as marijuana and that an undercover agent had smelled the material as it burned and had concluded that it was marijuana.

In the instant case, which was tried prior to the *Dick* decision, the trial court relied heavily on a Wisconsin case, *State v. Wind,* 60 Wis. 2d 267, 208 N.W.2d 357 (1973). There the Wisconsin Supreme Court concluded that the Duquenois-Levine and thin layer chromatography tests were not specific for marijuana. However, it held that evidence of those tests was properly admitted and went toward meeting the state's burden. The court then looked at the nonscientific evidence and concluded that the defendant's conviction for sale of marijuana should be affirmed.

> . . . But here, we have other facts which particularize and support the opinion of the expert: namely, the police officer asked for marijuana, and Wind agreed to sell marijuana and charged a price which would indicate it was marijuana. These facts are sufficient with the expert opinion to meet the standard of sufficiency under the "beyond a reasonable doubt" test.

Id. at 272, 208 N.W.2d at 361. *Wind* and *Dick* do not present new or unique theories, either. For example, in *Ewing v. United States,* 386 F.2d 10 (9th Cir. 1967), a conviction was affirmed in the total absence of expert opinion when a witness said she had smoked marijuana before and that she obtained marijuana from the defendant, smoked it, and was of the opinion that it was marijuana. *See also People v. Brinkley,* 25 Ill. App. 3d 27, 322 N.E.2d 514 (1975). *Cf., United States v. Agueci,* 310 F.2d 817 (2d Cir. 1962); *Toliver v. United States,* 224 F.2d 742 (9th Cir. 1955) (each dealing with nonscientific identification of heroin).

With this case law as a background it is clear that the trial court properly analyzed and weighed the evidence before it. Mark Rosasco, appellant's middle man, testified that he had gotten marijuana from appellant on previous occasions (T. 19). He said that on the day of the sale appellant stated that the substance he was providing to Rosasco was Mexican grade marijuana that had just come in a day or two earlier (T. 51-52). Appellant later reiterated this, telling a friend who gave him a ride home that same afternoon that he had just loaded 225 pounds of marijuana into Rosasco's trunk (T. 191, 201).

Appellant had taken great pains to hide the substance in question on a farm located some distance from his house. When Rosasco, who was very familiar with marijuana, went with appellant to the farm he opened one of the packages to examine its contents and determined that it did contain marijuana (T. 42). And when Rosasco returned to the Oronoco liquor store, Agent Stickler, who was a narcotics agent of three years' experience, also determined that the substance was marijuana (T. 63, 79-80). Additionally, he conducted a Valtox field test which supported his conclusion (T. 80-81).

The extravagant price of $115.00 per pound and the need apparently felt by appellant to operate in a clandestine manner and through a middle man added further support to the court's findings (T. 66). So, too, did the testimony that appellant was nervous and worried about the police coming to his house because a babysitter to whom he had supplied marijuana had been arrested (T. 47, 189).

Simply enumerating these examples of the evidence against appellant illustrates the lack of merit in his argument. Even if the scientific tests did not completely establish that the material sold by appellant was marijuana they went a long

way towards doing so. What little more was needed to prove the substance's identity beyond a reasonable doubt was fully supplied by the opinions of Rosasco and Sickler that the contraband was marijuana; the repeated statements of appellant that it was marijuana; the surreptitious manner in which appellant demanded the transfer occur; the price charged; the prior association of appellant and Rosasco, where Rosasco acted as a middle man in marijuana sales; and the fact that apparently none of these earlier sales resulted in "clients" complaining that they had been sold something other than the marijuana appellant represented they were getting. The court's decision was overwhelmingly supported by the evidence. Appellant has totally failed to surmount the burden which is his on appeal. His conviction should therefore be affirmed.

C. The Multiple Species Argument

Minn. Stat. § 152.01 subd. 9 (1974) defines marijuana as follows:

> "Marijuana" means all parts of the plant Cannabis sativa L., including all agronomical varieties, whether growing or not. . . .

Appellant's attorney testified at trial that *Cannabis sativa L.* is but one species of *Cannabis* and that there are other species, such as *Cannabis ruderalis* and *Cannabis indica* (T. 358). Appellant claims that the proof against him was inadequate because the state did not establish that he possessed *Cannabis sativa L.* as opposed to *Cannabis ruderalis* or *Cannabis indica.*[6] However, the state's expert controverted appellant's

[6] Appellant's Brief at 9-18.

testimony, testifying that *Cannabis* was monotypic and that any differences between individual *Cannabis* plants were due to the plants being of different agronomical varieties—that is, the same plant grown under different climatic conditions (T. 278, 281).

Of course, if the state's expert's testimony is credited the matter is at an end because the statute expressly includes agronomical varieties of *Cannabis sativa L.* in its definition of marijuana. But, even if we momentarily accept the testimony of appellant's attorney that from a botanist's viewpoint *Cannabis* is polytypic, appellant's conviction must still be affirmed.

The argument he asserts, while without precedent in this Court, has been resolved against appellant in numerous other state and federal courts. Perhaps the best discussion of the illogic of appellant's position is set forth by Chief Judge Bazelon in *United States v. Walton,* 514 F.2d 201 (D.C. Cir. 1975). That case involved a conviction pursuant to a statute which like Minnesota's defined marijuana as *Cannabis sativa L.* For purposes of its decision the court, assumed that *Cannabis* was polytypic. Then it attempted to determine the legislature's intent in defining marijuana as it had. The court noted that all species of marijuana contain tetrahydrocannabinol (THC) and that it was this toxic agent that led to the hallucinogenic or euphoric effects which spurred Congress to ban the possession, importation, and distribution of marijuana. Thus, Walton, like appellant, was actually arguing that the legislature meant to outlaw the euphoric effects of *sativa L.* but not the euphoric effects of other species.

> . . . This result seems manifestly unreasonable and furthermore could raise the most serious equal protection

> problems if it were adopted, *i.e.* an individual convicted for distribution of sativa L. could state with more than a little justification that no legitimate legislative purpose permits the government to jail persons who obtain a THC "high" from sativa L. but to not prosecute persons who obtain the exact same "high" from another species. . . .

Id. at 202-203. The court noted that, if *Cannabis* was polytypic, there was no scientific way to distinguish between species unless a whole plant were available for analysis—a highly unlikely situation in marijuana prosecutions.

> . . . one must certainly pause to consider why Congress would enact a law the violations of which could not be proven on the basis of present knowledge. Even if Congress did have such a method, it is apparently conceded that only citizens with expert botanical knowledge could distinguish between the various species of marijuana. This suggests a serious due process question: could the government prosecute an individual for possession of sativa L. when there are no means whereby the average citizen can distinguish between sativa L. and other species to thus conform his conduct to the requirements of the law? It presses us to extremes to hold that Congress would enact a law the violations of which are not detectable to the group of citizens to whom the law is addressed.

Id. at 203.

The law being analyzed in *Walton* like the one attacked here was carried forward from the Marijuana Tax Act of 1937. At that time, Judge Bazelon comments, the unanimous opinion of the experts was that marijuana was monotypic and that the term *sativa L.* encompassed all marijuana. Apparently no

authority felt that marijuana might be polytypic until the late 1960's. Even if we look to the state of knowledge as of 1970 when the federal statute on which Minn. Stat. § 152.01 subd. 9 (1974) is directly based was passed there is aboslutely no reason to believe (1) that the accepted view was that marijuana was polytypic, (2) that Congress or the Minnesota legislature were presented with persuasive evidence that marijuana was polytypic, or (3) that they could conceivably have intended to regulate only one form of *Cannabis* when all forms contain THC—the offending substance. *United States v. Walton*, 514 F.2d 201, 203 (D.C. Cir. 1975). Judge Bazelon's reasoning led him to conclude:

> . . . The legislative history is absolutely clear that Congress meant to outlaw all plants popularly known as marijuana to the extent those plants possessed THC. . . .

Id. at 203-204. There is absolutely nothing distinguishing the instant case from *Walton*. Our legislature, too, obviously meant to outlaw sale of all forms of marijuana. Whatever a trained botanist might consider *Cannabis sativa L.* it is clear that the legislature considers it to be any form of *Cannabis* which contains THC and is capable of producing a hallucinogenic or euphoric effect when smoked or ingested.

This result is confirmed by the decisions of every federal appellate court which has analyzed the question.[7] Similarly,

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[7] *See* United States v. Walton, 514 F.2d 201 (D.C. Cir. 1975); United States v. Honneus, 508 F.2d 566 (1st Cir. 1974); United States v. Rothberg, 480 F.2d 534 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973); United States v. Moore, 446 F.2d 448 (3d Cir. 1971); United States v. Sifuentes, 504 F.2d 845 (4th Cir. 1974); United States v. Gaines, 489 F.2d 690 (5th Cir. 1974); United States v. Dinapoli, 519 F.2d 104 (6th Cir. 1975); United States v. Burden, 497 F.2d 385 (8th Cir. 1974); United States v. Ludwig, 508 F.2d 140 (10th Cir. 1974).

state after state has found that the statutory definition of marijuana as *Cannabis sativa L.* includes all species of *Cannabis* if, in fact, there are other species.[8] There cases are so clear and their reasoning and holdings so directly and obviously applicable to this case that it would serve no purpose to analyze them in detail.

In the face of this authority appellant relies on a solitary case, *United States v. Lewallen*, 385 F. Supp. 1140 (W.D. Wis. 1974).[9] The comments of the Ninth Circuit Court of Appeals in *United States v. Kelly*, 527 F. 2d 961 (9th Cir. 1976), effectively deal with this aberrant decision:

> . . . [In Lewallen] the district court granted a defense motion for a judgment of acquittal. This action prevented the government from taking an appeal. Of particular significance is the fact that the judge in *Lewallen* relied principally upon *United States v. Collier*, (March 1974), an unreported Superior Court case from the District of Columbia.[10] That *Collier* was a slender reed on which to fashion a decision was made clear on March 5, 1975, when the District of Columbia Court of Appeals, *sub silentio* overruled that decision by reversing four other cases where trial judges had dismissed indictments on the same theory. . . .

[8] *See* Haynes v. State, 312 So. 2d 406, *cert. denied*, 312 So. 2d 414 (Ala. Crim. App. 1975); People v. Holcomb, 532 P.2d 45 (Colo. 1975); Connally v. State, 237 Ga. 203, 227 S.E.2d 352 (1976); State v. Miles, 97 Idaho 396, 545 P.2d 484 (1976); State v. Knight, 298 So. 2d 726 (La. 1974); State v. Donovan, 344 A.2d 401 (Me. 1975); State v. Allison, 466 S.W.2d 712 (Mo. 1971); State v. Thorp, 358 A.2d 655 (N.H. 1976); State v. Romero, 74 N.M. 642, 397 P.2d 26 (1964); Crow v. State, 551 P.2d 279 (Okla. Crim. App. 1976); Williams v. State, 524 S.W.2d 705 (Tex. Crim. App. 1975); State v. Wind, 60 Wis. 2d 267, 208 N.W.2d 357 (1973).

[9] Appellant's Brief at 12-14.

[10] Appellant, too, relies on *Collier*. Appellant's Brief at 14.

Id. at 963-964. *Collier* is further discredited when one considers that it arose in a district where *United States v. Walton*, 514 F.2d 201 (D.C. Cir. 1975), a decision directly contrary to *Lewallen*, is now the rule. *Lewallen* must be treated as what it is—a solitary, unsupportable aberration contrary to the rule in every other significant decision which has analyzed the statutory definition of marijuana.

However, appellant does pursue the *Collier* line of argument further and cites several nonmarijuana cases for the proposition that criminal statutes must be strictly construed.[11] This, he says, means that *Cannabis sativa L.* must be construed as a botanist would construe it. Once again, appellant's arguments have already been effectively rebutted by pertinent cases which he has ignored and which construe the various marijuana statutes. His precise argument was put forward in *United States v. Walton*, 514 F.2d 201 (D.C. Cir. 1975). The court noted, however, that the rule of construction urged by the appellant applied only in resolving ambiguities. Where there are no ambiguities the rule cannot be used to frustrate the intent of the legislature. Here, the court continued, the legislative history conclusively demonstrated that Congress believed it was outlawing all marijuana which contained THC. Specifically discarding the logic of the *Collier* court, the court pointed out that marijuana was not a technical term and that the legislature was addressing itself to the public at large and not to botanists. The botanical understanding of the term *Cannabis sativa L.* becomes irrelevant when the public knows and understands the term to include all marijuana and knows and understands that the statutory proscription applies to all marijuana—whatever scientific subclass a pure scientist may sug-

[11] Appellant's Brief at 14-18.

gest it belongs within. *Id.* at 203. *See also United States v. Dinapoli,* 519 F.2d 104, 106 (6th Cir. 1975).

There is nothing unique about the Minnesota statute. The same logic found in the multitude of decisions holding that the term *Cannabis sativa L.* includes all possible species of *Cannabis* dictates the same result here. Clearly, the Minnesota legislature did not intend to allow the sale of some species of THC-laden marijuana and not other, equally potent and objectionable species. There was sufficient evidence in support of appellant's conviction and it should be affirmed.

II. THE CLASSIFICATION OF MARIJUANA AS A SCHEDULE I CONTROLLED SUBSTANCE IS CONSTITUTIONAL AND IS NOT A DENIAL OF EQUAL PROTECTION.

Appellant advances a second argument which has met as little success in other courts as has his argument that the marijuana statutes speak only to one species of *Cannabis.* Minn. Stat. § 152.02 subd. 2 (1974) classifies marijuana as a Schedule I drug. Appellant claims that this classification is unreasonable and arbitrary and lacks a rational relationship to a permissible state objective.[12]

Repeatedly, the federal and state courts have reviewed similar statutory classifications of marijuana and upheld them in the face of equal protection assaults.[13] In opposition to this

[12] Appellant's Brief at 18-19.

[13] *See* Kehrli v. Sprinkle, 524 F.2d 328 (10th Cir. 1975); English v. Virginia Probation and Parole Bd., 481 F.2d 188 (4th Cir. 1973); United States v. Kiffer, 477 F.2d 349 (2d Cir. 1973); United States v. Rodriquez-Camacho, 468 F.2d 1220 (9th Cir. 1972); United States v. Bergdoll, 412 F. Supp. 1308 (D. Del. 1976); Roush v. White, 389 F. Supp. 396 (N.D. Ohio 1975); United States v. Maiden, 355 F. Supp. 743 (D. Conn. 1973); Tracey v. Janco, 351 F. Supp. 836 (N.D. W. Va. 1972); Kenny v. State, 51 Ala. App. 35, 282 So. 2d 387, *cert. denied,* 291 Ala. 786, 282 So. 2d 392 (1973); Ravin v. State,

line of authority appellant cites cases from only five jurisdictions—Connecticut, Illinois, Michigan, Oklahoma and the Federal District Court for the Eastern District of Virginia.[14] Of these he admits that the Connecticut case, *State v. Anonymous (1976-3),* 32 Conn. Sup. 324, 355 A.2d 729 (1976), has been reversed in *State v. Rao,* 370 A.2d 1310 (Conn. 1976). He does not mention that the federal case he relies on, *English v. Miller,* 341 F. Supp. 714 (E.D. Va. 1972), was similarly reversed in *English v. Virginia Probation and Parole Bd.,* 481 F.2d 188 (4th Cir. 1973). Further, the Oklahoma case, *Sam v. State,* 500 P.2d 291 (Okla. Crim. App. 1972), did not hold that marijuana was unconstitutionally classified in that state. Rather, it simply noted that marijuana was statutorily classified outside of the narcotic drugs and that the trial court erred in instructing the jury in terms of the wrong statutes—those dealing with narcotic drugs.

The Illinois and Michigan cases are all that remain, then, and they are easily distinguished. Neither *People v. McCabe,* 49 Ill. 2d 338, 275 N.E.2d 407 (1971), nor *People v. Sinclair,*

537 P.2d 494 (Alas. 1975); State v. Wadsworth, 109 Ariz, 59, 505 P.2d 230 (1973); People v. Bloom, 76 Cal. Rptr. 137 (Cal. App. 1969); People v. Stark, 157 Colo. 59, 400 P.2d 923 (1965); State v. Rao, 370 A.2d 1310 (Conn. 1976); Kreisher v. State, 319 A.2d 31 (Del. 1974); Blinco v. State, 231 Ga. 886, 204 S.E.2d 597 (1974); State v. Renfro, 56 Hawaii 501, 542 P.2d 366 (1975); State v. O'Bryan, 96 Idaho 548, 531 P.2d 1193 (1975); People v. McCaffrey, 29 Ill. App. 3d 1088, 332 N.E. 2d 28 (1975); Ross v. State, 360 N.E.2d 1015 (Ind. App. 1977); State v. Leins, 234 N.W.2d 645 (Iowa 1975); State v. Sliger, 261 La. 999, 261 So. 2d 643 (1972); State v. Donovan, 344 A.2d 401 (Me. 1975); Commonwealth v. Leis, 355 Mass. 189, 243 N.E.2d 898 (1969); State v. Stock, 463 S.W.2d 889 (Mo. 1971); State v. White, 153 Mont. 193, 456 P.2d 54 (1969); Egan v. Sheriff, Clark County, 88 Nev. 611, 503 P.2d 16 (1972); State v. Nugent, 125 N.J. Super. 528, 312 A.2d 158 (1973); People v. Morehouse, 364 N.Y.S.2d 108 (N.Y. Sup. 1975); State v. Strong, 245 N.W.2d 277 (S.D. 1976); Gaskin v. State, 490 S.W.2d 521 (Tenn. 1973); Miller v. State, 458 S.W.2d 680 (Tex. Crim. App. 1970).

[14] Appellant's Brief at 19.

387 Mich. 91, 194 N.W.2d 878 (1972), holds that it is unconstitutional to proscribe the sale of marijuana. Instead they simply hold that it is improper to classify marijuana as a narcotic drug *and* to impose the same penalty for the sale of marijuana as for the sale of narcotic drugs. First, this rule is directly contrary to the rule in other jurisdictions.[15] Second, its logic is not applicable to Minnesota's statutory scheme. Our legislature has defined marijuana as a Schedule I controlled substance and that schedule does include narcotic drugs. Minn. Stat. § 152.02 subd. 2 (1974). However, when sentences are imposed for violation of the statutes marijuana is treated differently than narcotic drugs. One convicted of the sale of a narcotic drug may be sentenced to a maximum of fifteen years in prison and a $25,000 fine. Minn. Stat. § 152.15 subd. 1(1) (1974). One convicted of the sale of more than an ounce and a half of marijuana may only be sentenced to a maximum of five years in prison and a $15,000 fine—the same penalty that would apply if marijuana had been classified in Schedules II or III. Minn. Stat. § 152.15 subd. 1(2) (1974). Thus, because the Minnesota legislature has differentiated the penalties between narcotics and marijuana it is irrelevant that marijuana is classified with some of the narcotics, and *McCabe* and *Sinclair* are inapposite.[16]

[15] *See* English v. Virginia Probation and Parole Bd., 481 F.2d 188 (4th Cir. 1973); Roush v. White, 389 F. Supp. 396 (N.D. Ohio 1975); Tracey v. Janco, 351 F. Supp. 836 (N.D. W. Va. 1972); Kenny v. State, 51 Ala. App. 35, 282 So. 2d 387, *cert. denied*, 291 Aa. 786, 282 So. 2d 392 (1973); State v. Wadsworth, 109 Ariz. 59, 505 P.2d 230 (1973); People v. Stark, 157 Colo. 59, 400 P.2d 923 (1965); Ross v. State, 360 N.E.2d 1015 (Ind. App. 1977); State v. Stock, 463 S.W. 2d 889 (Mo. 1971); Egan v. Sheriff, Clark County, 88 Nev. 611, 503 P.2d 16 (1972); State v. Strong, 245 N.W.2d 277 (S.D. 1976); Gaskin v. State, 490 S.W.2d 521 (Tenn. 1973); Reyna v. State, 434 S.W.2d 362 (Tex. Crim. App. 1968).

[16] *See* Kehrli v. Sprinkle, 524 F.2d 328 (10th Cir. 1975); People v. Morehouse, 364 N.Y.S.2d 108 (N.Y. Sup. 1975).

This distinction has even been recognized in Illinois, the home of the *McCabe* decision. While *McCabe* was pending the Illinois legislature reclassified marijuana so as to provide for lesser penalties than for violations involving narcotic drugs. This scheme was approved in *McCabe,* 49 Ill. 2d 338, 350, 275 N.E.2d 407, 413, and has been upheld in subsequent litigation. *People v. McCaffrey,* 29 Ill. App. 3d 1088, 332 N.E.2d 28 (1975).

Appellant, then, is left with nothing in the way of precedent supporting his arguments. Perhaps because of this lack of authority he advances a unique though equally unsupported theory centered around his personal construction of Minn. Stat. §§ 152.01 *et seq.* (1974).

Appellant notes that Minn. Stat. § 152.02 subds. 7, 8 (1974) authorizes the board of pharmacy to add additional substances to the schedules of controlled substances and to relocate substances within those schedules. The same subdivisions set forth the criteria the board is to use in making its decision. Appellant argues that marijuana satisfies none of the criteria for inclusion in Schedule I and is therefore placed there improperly.[17]

Appellant's argument ignores several crucial points. *First,* the criteria of Minn. Stat. § 152.02 subds. 7, 8 (1974) are addressed only to the addition or transfer of drugs on the schedules. They do not purport to apply to the original classification of drugs by the legislature.

Second, Minn. Stat. § 152.02 subd. 8 (1974) provides in part:

> . . . The state board of pharmacy, after consulting with the advisory council on controlled substances, shall an-

[17] Appellant's Brief at 22-28.

nually, on or before May 1 of each year, conduct a review of controlled substances in the various schedules.

. . .

In spite of the fact that the board has necessarily reviewed marijuana's classification on a yearly basis, it has apparently chosen not to exercise its power to reclassify. Appellant does not and cannot question the expertise of the board. Since this panel of experts has repeatedly given its implied approval to marijuana's classification and since the only evidence before this Court favoring a different classification is the testimony of appellant's own attorney, one must question the weight to be given that testimony. The indication is that marijuana is properly classified.

Third, as discussed above, the sentencing provisions pertaining to marijuana are substantially less severe than those pertaining to Schedule I narcotics. Thus, even if it could be established that marijuana is substantially different from narcotics it would not necessitate reclassification because the legislature has already recognized the differences and has taken them into account in its sentencing provisions. At the time of appellant's conviction the sale of marijuana was no more severely punished than the sale of a Schedule III drug such as mixtures containing secobarbital or certain forms of codeine. To argue on the basis of marijuana's inclusion in Schedule I is therefore misleading and inappropriate.

Appellant's final barrage is an arguemnt that it is unconstitutional to control the sale of marijuana when alcohol and tobacco, which he claims are more harmful, are not controlled. He cites no authority because no court has ever so held. In fact,

every court which has faced the question has upheld the statutes prohibiting the sale of marijuana.[18]

Appellant can cite no applicable or persuasive authority in support of his argument that the classification of marijuana in Schedule I unconstitutionally denies him equal protection. In fact, even a cursory review of the applicable case law shows the legislative classification is rationally based on the state's need to protect its population from the dangers of marijuana and its sale and that it is neither unreasonable nor arbitrary. The trial court properly denied appellant's constitutional challenge and this Court should affirm that decision.

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[18] *See* United States v. Bergdoll, 412 F. Supp. 1308 (D. Del. 1976); Ravin v. State, 537 P.2d 494 (Alas. 1975); Blincoe v. State, 231 Ga. 886, 204 S.E.2d 597 (1974); State v. Leins, 234 N.W.2d 645 (Iowa 1975); State v. Renfro, 56 Hawaii 501, 542 P.2d 366 (1975); State v. Donovan, 344 A.2d 401 (Me. 1975); Commonwealth v. Leis, 355 Mass. 189, 243 N.E.2d 898 (1969); Miller v. State, 458 S.W.2d 680 (Tex. Crim. App. 1970).

CONCLUSION

The evidence offered against appellant proved his guilt beyond a reasonable doubt and the statutes under which he was convicted are constitutional. This Court should affirm the judgment of the trial court.

Respectfully submitted,

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OPINION 10-20-78

JUSTICE WAHL # 348

47427

STATE OF MINNESOTA

IN SUPREME COURT

STATE OF MINNESOTA,

Respondent,

vs.

BOSTON PAUL VAIL,

Appellant.

PETITION FOR REHEARING

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STATE OF MINNESOTA,

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Appellant.

PETITION FOR REHEARING

Appellant, Boston Paul Vail, respectfully petitions the Court for a rehearing of its decision filed Friday, October 20, 1978. This Petition is based on the following arguments:

1. Remand of this case for a new trial is improper in light of the Double Jeopardy Clause;

2. The Supreme Court's decision with regard to the multiple-species question is ambiguous;

3. The Supreme Court has overlooked law and evidence when it ruled on the Constitutionality of the statute in question.

ARGUMENT

1. Remand of this case for a new trial is improper in light of the Double Jeopardy Clause.

In this case, the Supreme Court upheld the trial judge's findings that the scientific evidence of the identification of the substance was insufficient to identify the substance beyond a reasonable doubt. The Supreme Court then went on to consider how the trial court dealt with inferences identifying the substance from non-scientific evidence. The Supreme Court stated:

> We have not prescribed minimum evidentiary requirements in identification cases, preferring to examine the sufficiency of the evidence on a case-by-case basis. See, e.g., State v. Dick, ____ Minn. ____, 253 N.W.2d 277 (1977); State v. Boyum, 293 Minn. 482, 197 N.W.2d 218 (1972). In this case we do not believe that the additional considerations relied on by the trial court are sufficient to support its determination of guilt. Minnesota law requires proof of the actual identity of the substance, the defendant's belief is not sufficient. State v. Dick, ____ Minn. ____, 253 N.W. 2d 277, 279 (1977). The price charged and representations made by the defendant are, at best, only assertions of his belief.
>
> At trial, the State expressly abandoned its attempt to infer identity from quantities; we find no necessary relationship. Finally, the last "fact" listed, a commercial practice of testing among large-volume sellers, is wholely speculative and unsupported by the evidence. Rosasco and Sickler both testified that no part of the material in issue was ever burned or smoked. (Footnote omitted) On the facts of this case, we conclude that the "additional factors" simply do not advance the State in satisfying its burden of proof, given the trial court's skepticism of the scientific evidence. However, because the trial court misapprehended the standard of proof applicable, i.e., the necessity of proving only genus, not species, we cannot determine from the judgment and accompanying memorandum whether the State's scientific evidence would have satisifed the trial court had it applied what we hold to be the correct standard. (Footnote omitted.) Accordingly, we must reverse and remand for a new trial consistent with the principles we have enuciated.

State v. Vail, slip op. Based on the trial court's interpretation of the statute (to require the State to prove the identification of the substance as Cannabis sativa L. beyond a reasonable doubt), the Supreme Court held in this case that the evidence was not sufficient to prove the identification of the substance as Cannabis sativa L. beyond a reasonable doubt. This holding elucidates two factors:

1. Given the trial court's interpretation of the law, the Supreme Court held the evidence was insufficient to sustain a

conviction under that interpretation.

2. The trial court made a legal error interpreting the statute.

Because the Supreme Court reversed the conviction for insufficient evidence, the Court should have entered a judgment of acquittal rather than remanding for new trial. This holding is required despite the fact that the acquittal is the result of a legal error made by the trial court.

It is unquestionably true that a defendant cannot be tried a second time after the trial court enters a judgment of acquittal on the basis of insufficient evidence. Burks v. U.S., ____ U.S. ____, 98 S.Ct. 2141, 2147 (1978), citing Fong Foo v. U.S., 369 U.S. 141 (1962) and Kepner v. U.S., 195 U.S. 100 (1904). However, for a long time, the law was unclear whether the Double Jeopardy Clause applied to bar retrial when an appellate court decides that a conviction should be reversed for insufficient evidence. In Burks v. U.S., supra, this question was answered:

> In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insurance that the guilty are punished. See Note, Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence, 31 U. Chi. L.Rev. 365, 370 (1964).
>
> The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice. For it has been given one fair opportunity to offer what proof it could assemble. (Footnote omitted) Moreover, such an appellate reversal means that the Government's case was so lacking that it should not have even been submitted to the jury. Since we necessarily afford absolute finality to a jury's verdict of acquittal--no matter how erroneous its decision--it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.
>
> * * *
>
> Since we hold today that the Double Jeopardy Clause precludes a second trial once the

conviction under that interpretation.

2. The trial court made a legal error interpreting the statute.

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>
> * * *
>
> Since we hold today that the Double Jeopardy Clause precludes a second trial once the

> reviewing court has found the evidence legally insufficient, the only "just" remedy available for that court is the direction of a judgment of acquittal.

Burks v. U.S., supra, ____ U.S. ____, 98 S.Ct. at 2149-2150. Since the Supreme Court in the instant case found that the evidence was insufficient to support a guilty verdict on the charge of possession of the species Cannabis sativa L., this Court should direct a judgment of acquittal.

A question apparently remains, however. That question is whether the Court in the instant case has reversed and remanded for "trial error". The U.S. Supreme Court's decision in Burks, supra, suggests that the reversal in the instant case was not one for "trial error". "Trial error" is defined as follows:

> As such it implies nothing with respect to the guilt or innocence, rather it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct.

Burks v. U.S., supra, ____U.S. ____, 98 S.Ct. at 2149. The Court in Sanabria v. U.S., ____ U.S.____,

98 S.Ct. 2170 (1978) expands upon this question. In Sanabria, the trial court excluded certain evidence concerning numbers betting, based on an interpretation of a statute and an indictment. The court then granted defendant's motion for a judgment of acquittal. In later denying the government's motion to reconsider, the Court "indicated that, had it granted the motion to restore the numbers evidence, it also would have vacated the judgment of acquittal." Sanabria v. U.S., supra, ____ U.S. at ____, 98 S.Ct. at 2176. The Supreme Court noted that "The ruling below is properly to be characterized as an erroneous evidentiary ruling, (footnote omitted) which led to an acquittal for insufficient evidence. That judgment of acquittal, however, as erroneous, bars further prosecution on any aspect of the count..." Sanabria v. U.S., supra, ____ U.S. at ____, 98 S.Ct. at 2181. The Court also stated, "Thus when a defendant has been acquitted at trial he may not be retried on the same offense, even if the legal ruling underlying the acquittal were erroneous."

Sanabria v. U.S, supra, ____ U.S. at ____, 98 S.Ct. at 2179.

In the instant case, the Minnesota Supreme Court held that the evidence was insufficient to convict Boston Paul Vail of selling Cannabis sativa L. Under Burks, supra, such a holding is equivalent to an acquittal at trial. Inserting the instant case's state of facts into the Sanabria rule, we conclude:

> When a defendant's conviction has been reversed by an appellate court for insufficient evidence, he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous.

Despite the trial court's erroneous interpretation of the definition of marijuana, the Supreme Court's reversal for insufficient evidence requires that a judgment of acquittal be entered. Even if this Court finds that a remand is required, the Court should not require a completely new trial. If the Double Jeopardy Clause does anything, it prevents the State from starting afresh and marshalling greater evidence, in a case where the appellate

court decides the evidence presented at the first trial is insufficient. Rather, the trial court should be limited to reviewing the records and determining therefrom whether the evidence presented at the first trial was sufficient to prove the identity of the substance as the genus Cannabis beyond a reasonable doubt. Since demeanor evidence is not relevant to this process, the Supreme Court can just as well review the record and make this determination. Since all Defendant-Appellate's evidence was presented in terms of identifying the genus Cannabis, specifically distinguished from the species involved, the trial court's determination that the identity of the species was not proven applies as well to the conclusion that the identity of the genus was also not proven.

That defense expert witness, Marc Kurzman, was referring to the genus Cannabis, rather than the species Cannabis sativa L., throughout his testimony is clear:

> I keep saying Cannabis, because I don't want to confuse the genus-species issue, Cannabis indica, Cannabis ruderalis,

Cannabis sativa, from the reliability of the test issue.

(Trial transcript, p. 385, lines 3-6.) With respect to whether the tests used by the State were sufficient to identify the suspect substance, Kurzman testified at various times as follows:

A (Kurzman): The thin layer chromatograph is merely a method of separating. It's not specific for any particular compound whatsoever. It's just how you separate out different compounds that are mixed together.

Q (Manahan): You mentioned infrared spectrometry and --

A: Right.

Q: --three other tests.

A: Those other spectroscopy tests are not specific to Cannabis or tetrahydracannabinol, but ...when you conduct a test, you're looking for a graph or read-out which will be specific for a particular chemical compound such as testrahydracannabinol.

(Trial transcript, p. 349, lines 14-25.) Further,

Q: Can you given an example, for instance, with regard to the microscopic examination that was made?

A: Yes. If there were segments of the hops plant here, they would have bracts that would appear similar in appearance to that of Cannabis. They would have

cystolithic hairs which would appear similar to that of Cannabis. They would have glandular hairs (which were, to my recollection, not attested to as being observed by Ms. Rummel, but perhaps they were), but they would also have glandular hair that would appear similar to that in appearance to Cannabis. There may be different plant material that have achenes for fruits which would be similar in appearance to that of Cannabis, and so if you were looking at that under a microscope and saw the presence of these different components, unless we had first purified the substance, it would be difficult to make an affirmative statement that those components were from any particular single plant or may have been present.

Q: Would the same problem arise in connection with the Duquenois-Levine test?

A: A similar problem would arise with the Duquenois-Levine.

(Trial transcript, p. 353, line 13; p. 354, line 7.)

Further,

Q: Is the test specific for Cannabis?

A: Microscopic examinations are not specific for Cannabis. . . .

(Trial transcript, p. 362, lines 14-15.) Further,

Q: Are there any scientific studies that you are aware of that support the statement which was made, that all of the features as identified by Ms. Rummel microscopically are unique to Cannabis?

A: No, I'm not aware of any studies that would support such a statement.

(Trial transcript, p. 363, lines 9-14.) Further,

Q: What's the significance, Professor Kurzman, of a substance passing, if you will, all three of these tests that you have just discussed. . . .

A. I would say that there is a possibility that the substance might be Cannabis. There is--the possibility is the sum of the percentage of error that you would incur--or that would occur with each of the tests taken alone. While you have the added effect of the screens by screening out substances that it is not, you also have the added multiplying effect of the percentage of error, and if you started out with a substance that could be more than one substance, then you could virtually throw out your test results because one substance might give you some of the components in the microscopic or maybe all of the components in the microscopic, but that substance itself wouldn't pass the Duquenois-Levine. Maybe its the horse urine that's present, or maybe it's one of the hundreds of other plants that would pass the Duquenois-Levine, that pass Duquenois-Levine, and then when you get to the thin-layer chromotograph with, oh, roughly a million chemical compounds known to date; if you have a one-in-ten possibility, you have narrowed the field down to a hundred thousand.

(Trial transcript, p. 366, line 25; p. 367, line 2; p. 367, line 7-24.) Further,

A: I have conducted microscopic, Duquenois-Levine, and thin-layer chromotographic tests on substances which are not Cannabis and have so called positive reactions merely by mixing together substances that have the different components.

(Trial transcript, p. 376, lines 2-5.) Further,

A: I'm saying that tests themselves are not reliable to indicate to any degree of reasonable scientific certitude that the substance is Cannabis, regardless of who runs the test.

(Trial transcript, p. 377, lines 5-7.) Further,

A: The tests are all screening tests. There may be some indication that the substance was Cannabis, but it may have been hundreds and thousands and literally hundreds of thousands of other substances that would have passed the same test in the same way.

(Trial transcript, p. 384, lines 19-23.) Further,

A: Just that final point that regardless of which species we are either accepting of in terms of theory or speaking of in terms of the actuality, the tests are equally unreliable as to any of the species, whether it be sativa or more than one species.

(Trial transcript, p. 385, lines 9-12.) Finally, defense counsel specifically argued in his closing argument that, "I don't think the State has adequately proved that it was Cannabis in one form or

another." (Trial transcript, p. 389, lines 19-20.) While the trial court specifically couched its decision in terms of the species Cannabis sativa L., it is clear from the testimony that the Court would have to find the tests incapable of identifying beyond a reasonable doubt a substance as the genus Cannabis. The Supreme Court, therefore, should, upon its review of the transcript, enter a judgment of acquittal.

2. The Supreme Court's opinion is ambiguous with regard to the multiple species question.

On one hand, the Supreme Court notes that the trial judge found Cannabis to be a polytypic substance (that is, Cannabis has more than one species). On a different issue, the Court states that:

> The trial before Judge Olson was held following defendant's written and informed waiver of his right to a jury. Under those circumstances, the judge's findings of fact are entitled to the same weight on review as a jury verdict. (Citations omitted) Such findings will not be set aside unless clearly erroneous. (Citations omitted) These findings of fact are therefore upheld.

State v. Vail, slip op. Thus, unless the Supreme Court holds the trial court's finding to be clearly erroneous, the Supreme Court is bound by the fact that there exists more than one species of the genus Cannabis. The Court then goes on to state:

> In 1970, the Federal Bureau of Narcotics and Dangerous Drugs drafted legislation approved by the National Conference

> of Commissioners on Uniform State Laws as the Uniform Controlled Substances Act. Minnesota adopted most of the Uniform Act, including the definition of "marijuana" in issue in this appeal. (Citation omitted) Although there has been scientific studies questioning the monotypic categorization, (footnote omitted) it was generally assumed by the lay and legal community that there was but one species of marijuana subject to the agronomical variation, i.e., differences attributable to climatic conditions. the definition reflects a general legislative intent to regulate all species of the genus Cannabis, and we so hold.

State v. Vail, slip op. This holding specifically contradicts the trial court's finding that:

> The Minnesota statute, which has been more recently enacted in 1971, occurred at a time when the scientific knowledge with respect to whether there was more than one species of Cannabis led most scientists to the conclusion that there was more than one species and probably the following three species: Cannabis sativa L, Cannabis ruderalis, and Cannabis indica.

The Court's opinion notes that "the Legislature has repeatedly amended Minnesota Statute 152.15 to reduce penalties. L. 1971,

c. 937, §17; L. 1973, c. 693, §§10-13; L. 1976, C. 42 §§1, 2." State v. Vail, slip op., and that the State Board of Pharmacy annually reviews the classifications of drugs. State v. Vail, slip op. at n. 13. Thus, given the state of scientific knowledge in 1971, the frequent review of the statute by the legislature in 1971, 1973, and 1976, and the annual review by the State Board of Pharmacy, it is hard to conceive that the State legislature did not know the polytypic nature of Cannabis. Given that state of knowledge, and given the frequent review undertaken by the State legislature, and given the failure of the State legislature to amend the statute, it can only be concluded that the State legislature intended to outlaw the specific substance Cannabis sativa L. It is not enough to say:

> Nevertheless in the interest of clarity, the legislature might wish to consider the example set by the several states who have recently revised their definition of marijuana to include "all species of the genus Cannabis."

State v. Vail, slip op. at n. 10, and text accompanying.

In addition, because the complaint charges defendant with possession and sale of marijuana, the prosecution should be forced to prove the charges complained of. Note the trial court's assertion of this principal in Sanabria v. United States, ___ US ___, ___ 98 Sup.Ct. 2170, 2176 (1978). Thus, since the prosecution charged defendant with possession and sale of Cannabis sativa L, the prosecution should be required to prove possession and sale of Cannabis sativa L.

But why should this be so? In 1938, when Cannabis sativa L was first added to the federal statute, "The federal decision . . . seemed to be grounded on the state of the knowledge then prevailing which was that Cannabis was pretty much synonymous with Cannabis sativa L . . . ." (Memorandum of Judge Olson, Appellant's Brief, page A-17.) The harm to be prevented was possession and sale of a substance which contained

a psychoactive chemical, to wit: tetrahydracannabinol. The separate substance tetrahydracannabinol was later specifically added to the schedule of controlled substances to cover the circumstances where an individual synthesizes the chemical. The object of the law, therefore, appears to be to prevent the possession and sale of the psychoactive substance, tetrahydracannabinol. When this Court stated, "There is no scientific evidence that any of the species of the genus Cannabis lack THC," the Court seemed to conclude that since all species contain THC, the legislature meant the genus Cannabis when it wrote the species Cannabis sativa L.

It is respectfully submitted, however, that the Court incorrectly assigned the burden of proof on this issue. Given that State criminal statutes must be construed strictly in favor of the defendant, it would seem to be the burden of the State to prove that all species of the genus Cannabis contain THC, if

indeed it was the intent of the legislature to outlaw the genus rather than the species. There is no evidence in the record to show that; indeed, all species of the genus Cannabis may not contain THC. Since the State has failed to meet its burden of proof, the statute must be strictly construed against the State to require it to prove the identity of the substance as the species Cannabis sativa L.

We can reach the same conclusion, that the statute must be strictly construed to proscribe only the species Cannabis sativa L by examining closely the case law on this subject. The Supreme Court's opinion notes that:

> Our decision is consistent with those of the overwhelming majority of jurisdictions which have considered the issue. The conclusions of other state and federal courts are entitled to great weight when construing a uniform law.

State v. Vail, slip op. at n. 9. The Court then goes on to cite a significant number of federal and state cases. However, in so holding,

the Court completely ignored the treatment given to most of these cases in Appellant's Brief at pages 10 and 11. Simply stated, that treatment distinguishes all the cases cited by the Court. All those cases relate back to U.S. v. Rothberg, 351 F.Supp. 1115, and U.S. v. Moore, 330 F.Supp. 684. Both those courts and therefore the courts relying on those opinions, state that the intent of congress was clear at the time the statute was enacted. The statute under consideration in those cases (Rothberg and Moore) was enacted in 1937. It may be true that the congress and state legislatures intended in 1937 to outlaw the genus Cannabis, thinking at that time that Cannabis was monotypic. Such an interpretation is consistent with the trial court's findings in the instant case. See Appendix to Appellant's Brief at A-17. What is most significant, however, is that amendments of or enactments of marijuana statutes after the Moore and Rothberg decisions continue to proscribe simply Cannabis sativa L. This specific proscription continues despite

the knowledge gained by scientists, and therefore available to legislators, that Cannabis was in fact polytypic. This again is in accord with the trial court's findings in the instant case. See Appendix to Appellant's Brief at A-17. Thus, the Court's reliance on Moore and Rothberg and their progeny, see State v. Vail, slip op. at n. 9, is misplaced. At the very least, the Court should address the distinction between the Moore/Rothberg line of cases and subsequent statutory enactments.

Finally, the Court justifies its holding on this issue by stating:

> Moreover, we are satisfied that our interpretation does not raise problems of adequate public notice. Identification of the species of Cannabis is irrelevant to the user and practically impossible in its common commercial forms. We think that members of the general public of common intelligence understand that the clandestine sale of marijuana, whatever the species, constitutes a crime.

State v. Vail, slip op. Certainly there is no notice problem when a person believes that the

sweep of a statute is broader than the actual sweep of the statute. But consider the converse of that situation: Whether an individual who believes that only the species Cannabis sativa L is proscribed has adequate notice that Cannabis ruderalis or Cannabis indica is proscribed. Thus, for those people who believe that only the species Cannabis sativa L was proscribed by statute, the Court's decision raises particular notice problems. If anything, then, the Court's interpretation of the statute must be prospective only, and cannot apply to the instant case.[1].

In light of these questions, the Court should schedule this case for reargument on the multiple species issue.

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1. If this analysis is correct, then this case is squarely within the confines of Burks v. United States, supra.

3. The Court's holding on the Constitutionality issue is internally inconsistent, and should be reconsidered, especially in light of new statutory and factual evidence available since this case was first argued.

In holding the classification of marijuana in Schedule I to be Constitutional, and not arbitrary and irrational, the Court stated:

> In response to growing public and scientific opinion against imposing Schedule I penalties on marijuana users, the Legislature has repeatedly amended Minnesota Statute 152.15 to reduce penalties. . . .
>
> It is apparent, then, that nominal inclusion of marijuana within Schedule I has little impact, since the classification is not a controlling factor in the scheme of punishment.

State v. Vail, slip op. In a footnote, the Court states that the legislature has in fact enacted a three-level Schedule I penalty scheme for: narcotic drugs, other Schedule I substances except marijuana, and marijuana. This view of the statute is correct, but only in the narrowest of terms. This three-level Schedule I penalty scheme only exists when considering possession of (or distribution, for no remuneration, of) less than 1.5 ounces of

marijuana. Possession of, or distribution of, more than 1.5 ounces of marijuana may result in a sentence of five years and $15,000.00. There is, therefore, no three-level penalty scheme for those possessing or selling more than 1.5 ounces of marijuana. We submit that this Court is in error, stating that "nominal inclusion of marijuana within Schedule I has little impact, since the classification is not a controlling factor in the scheme of punishment." Rather, the classification of marijuana in Schedule I is clearly a controlling factor in the scheme of punishment. Marijuana distributors are punished as severely as distributors of amphetamines. (Minn. St. §152.02, Subd. 3(3)(a)) and phencyclidine (PCP) (Minn. St. §152.02, Subd. 4(2)(c)).

From another perspective, it is clear that the statute does not stand up to Constitutional scrutiny. At Footnote 13 of the Court's opinion, it is held that Minn. St. §152.02, Subd. 8 controls the rescheduling of substances already listed by statute. The Court so holds in rejecting

Defendant-Appellant's analysis that §152.02, Subd. 7 controls. Under either subdivision of the statute, serious Constitutional problems exist.

In another case raising similar Constitutional problems with regard to classifying cocaine, see State v. Carlson, Minnesota Supreme Court Docket Nos: 48871, 48880, and 48550, testimony was adduced from the Secretary of the State Board of Pharmacy that the State Board does not conduct the annual review required by statute. (See Transcript, Holmstrom testimony, p. 6.)[2] Rather, the State Board relies solely on changes made by the Federal Drug Enforcement Administration. Any debate concerning the effects of marijuana has not been heard by the Minnesota State Board of Pharmacy. Should this Defendant be penalized because the Minnesota State Board of Pharmacy has failed to discharge its statutory duties? At the very least, this cause should be stayed until Defendant has an opportunity to present his claims regarding marijuana to the State Board of Pharmacy. Inaction by the State Board of Pharmacy, therefore,

[2]See relevant part attached hereto as Appendix A.

only fuels what debate remains concerning the physical and psychological effects of marijuana; this inaction lends credence to the argument that various boards of pharmacy have not rescheduled marijuana and therefore must still consider marijuana to be physically and psychologically harmful. The falicy of this argument is clear.

Where legislatures have reconsidered the issue, they have made changes in statutes. It has already been noted in Appellant's Brief (p. 25) that marijuana has attained a currently accepted medical use. This recognition has led four states (Illinois, New Mexico, Florida, and Louisiana) to amend their state laws with regard to the controlled substance. Were §152.02, Subd. 7 controlling, it is clear that marijuana no longer would qualify for Schedule I since it now has a currently accepted medical use in the United States.

Why §152.02 Subd. 8 controls rather than 152.02 Subd. 7 is not clear. The Court holds that Subd. 8 controls; however, the Court does not explain why. Subd. 8 provides that "in making a determination

regarding a substance, the Board of Pharmacy shall consider the following: (factors listed)." How Subd. 8 alone governs the placement or re-scheduling of substances in various schedules, when criteria for such placement are not specifically listed, is a mystery, especially in light of Subd. 7, which does specifically enumerate criteria for placement of substances into the various schedules. The Court seems to rely on language in Subd. 7 which states that "The Board of Pharmacy is authorized to regulate and define additional substances...." (emphasis added) And adds therefore an additional pre-requisite that those criteria apply only to subsequent inclusions. If only additional substances are governed by Subd. 7, then what substances are governed by Subd. 8?

Conspicuously lacking as a factor in Subd. 8 is whether the substance has a currently accepted medical use in the United States. Is the Court suggesting that a substance listed by the Statute (as enacted in 1971) which currently has accepted medical use, may be scheduled in Schedule I?

Under such an interpretation, Schedule I will contain substances which have both currently accepted medical use in the United States and no currently accepted medical use in the United States. Such a conclusion renders the scheduling system a complete shambles. To resolve this problem, one must construe the factors in Subd. 8 to be the same as the factors in Subd. 7. Thus, factors such as "the state of current scientific knowledge regarding the substance", and "the risk to public health" must be construed to refer to whether there exists a currently accepted medical use of that substance in the United States. If this is true, then the scheduling criteria of Subd. 7 are the same as those in Subd. 8. Since marijuana has a currently accepted medical use in the United States, under either Subd. 7 or Subd. 8, the substance cannot remain in Schedule I. This arbitrary inclusion of marijuana in Schedule I is a violation of Defendant's right to equal protection of the laws and is unConstitutional. The Court should so hold.

CONCLUSION

Defendant-Appellant respectfully requests the Court to grant rehearing and reargument of this cause, based on the substantial issues raised concerning the Court's first opinion in this case.

Respectfully submitted,

KURZMAN & MANAHAN

By: RONALD S. GOLDSER
MARC G. KURZMAN
JAMES H. MANAHAN

Attorneys for Appellant

STATE OF MINNESOTA — DISTRICT COURT
COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

State of Minnesota, Plaintiff, -vs- Jeffrey Carlson, Defendant.	OMNIBUS HEARING COUNT I UNLAWFUL SALE OF SCHEDULE II NARCOTIC CONTROLLED SUBSTANCE COUNT II UNLAWFUL POSSESSION WITH INTENT TO SELL SCHEDULE II NARCOTIC CONTROLLED SUBSTANCE D.C. FILE NO. 69571 C.A. FILE NO. 77-2454 AND ANOTHER FILE COUNT I UNLAWFUL SALE OF SCHEDULE II NARCOTIC CONTROLLED SUBSTANCE D.C. FILE NO. 69572 C.A. FILE NO. 77-2457

The above-entitled matter came duly on for hearing before the Honorable Patrick W. Fitzgerald, on the 3rd day of April, 1978, at approximately 8:45 o'clock a.m., 1553 Hennepin County Government Center, Minneapolis, Minnesota.

A P P E A R A N C E S

ROBERT T. RUDY, ESQ., Assistant County Attorney, appeared on behalf of the State of Minnesota.

MARC KURZMAN, ESQ., appeared on behalf of the Defendant.

Grant Peterson and Joan Morrow were the Clerks

Linda K. Renner, Court Reporter.

-ooo-

DIRECT EXAMINATION

* * *

BY MR. KURZMAN:

Q. What is your address, please.

A. My home is at 12226 Oak Leaf Circle in Burnsville.

Q. Are you presently employed and if so, would you state your employment?

A. Yes. I'm presently employed as the Executive Secretary of the Minnesota Board of Pharmacy.

Q. Are you licensed as a pharmacist in the State of Minnesota?

A. Yes, I am.

Q. Are you also admitted to practice law in the State of Minnesota?

A. Yes, I am.

Q. How long have you been employed as the Executive Secretary of the State Board of Pharmacy?

A. Three and a half years.

Q. Mr. Holmstrom, I direct your attention to Minnesota Statute 152.02, Subd. 7, I believe you've had an opportunity to take a look at that statute before, it speaks to the Board of Pharmacy placing substances in various schedules within the controlled substance statute.

A. That's correct.

Q. Specifically, subparagraph eight speaks to the Board of Pharmacy after consulting with the Advisory Counsel on

Controlled Substances annually on or before May 1st of each year conducting a review of the placement of controlled substances in the various schedules. To the best of your knowledge, has such an annual review been conducted during your tenure as Executive Secretary of the State Board of Pharmacy?

A. It's the interpretation of the Board that such a review does not consist of a review of all the substances that are currently scheduled, which would be a tremendous task, but it's the position of the Board that such a review consists of a review of the activities of the Drug Enforcement Administration and HEW in this area during each year.

Q. Would it be fair to say then that there is not an independent review by the State Board of Pharmacy's Advisory Counsel on Controlled Substances each year of the substances which are placed within the schedule?

A. That's correct.

Q. With respect now to cocaine, are you familiar with that substance?

A. Yes, I am.

Q. Do you know whether that is scheduled within the State of Minnesota's Controlled Substance Act?

A. Yes. It is within the Chapter 152.

Q. Do you know what schedule cocaine has been placed in

Minnesota?

A. Cocaine has been placed in Schedule II.

Q. Do you know whether in making that determination the Board of Pharmacy considered the actual or relative potentials for abuse, scientific evidence of it's pharmacological effect, the state of current scientific knowledge, the history and current pattern of abuse, the scope, duration and significance of abuse, the risk to public health, the potential of the substance to produce psychic or psychological dependence liability and/or whether the substance is an immediate percursor of a substance already controlled?

A. In that cocaine was placed in the controlled substance's list before I became associated with the Board, I do not know of any firsthand knowledge of it, but I believe that those things were taken into consideration in the original scheduling of cocaine.

Q. When you say, "in the original scheduling," are you referring then to what you believe might have been the rationale of the Federal Congress in their enacting their original Uniform Controlled Substances Act of 1970?

A. Yeah. In most cases, virtually all cases, when a drug is placed in the controlled substances list in Minnesota, the Board of Pharmacy has relied upon the findings of the Federal Drug Enforcement Administration in reaching it's

decision. We simply don't have the resources available to conduct our own investigations into all of these various substances.

MR. KURZMAN: I have no further questions, Your Honor.

THE COURT: Any cross-examination. Mr. Rudy?

MR. RUDY: No, Your Honor.

THE COURT: That's all, sir, you may step down.

* * *

47427

STATE OF MINNESOTA
In Supreme Court

STATE OF MINNESOTA,
Respondent,

vs.

BOSTON PAUL VAIL,
Petitioner.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR REHEARING

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vs.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR REHEARING

LEGAL ISSUE

Did this court properly remand this case for a new trial due to the fact that the trial court improperly required the state to establish that petitioner sold one particular species of cannabis?

PRELIMINARY STATEMENT

Petitioner alleges three grounds in his Petition for Rehearing. First, he claims that a retrial would improperly subject him to double jeopardy. Second, he claims that this court erred in holding that the term cannabis sativa L, as used in Minn. Stat. § 152.02 subd. 2 (1974), includes all forms of cannabis—whether that substance is polytypic or monotypic. Third, he claims that this court erred by holding that the classification of marijuana as a Schedule I drug does not constitute a denial of equal protection because marijuana violations are subject to a less severe scheme of punishment than are other Schedule I violations.

The latter two issues have already been fully briefed and argued before this court and petitioner's petition does no more than repeat the arguments this court has already explicitly rejected. Respondent will, therefore, rely upon the record as to those two issues and will address only the double jeopardy claim which petitioner asserts.

ARGUMENT

THIS COURT PROPERLY REMANDED THIS CASE FOR A NEW TRIAL.

As this court found, the trial court used the wrong standard in reviewing the evidence before it. The trial court held that marijuana was polytypic and required the state to prove that petitioner had sold cannabis sativa L as opposed to another species of cannabis. However, the trial court was satisfied that the state had met this burden and it convicted the petitioner of the sale of a controlled substance.

This court disagreed. It accepted the trial court's finding that the scientific evidence presented by the state did not fully establish that the substance in question was cannabis sativa L. It rejected, however, the trial court's use of other circumstantial evidence to augment the scientific evidence and establish proof beyond a reasonable doubt that the substance was cannabis sativa L.

Petitioner correctly interprets *Burks v. United States*, —— U.S. —— (1978), as holding that when a case is reversed because of insufficient evidence a retrial is barred by the constitutional prohibition against placing a defendant twice in jeopardy for the same offense. However, he incorrectly tries to force the facts of this case into the *Burks* mold.

Neither this court nor the trial court held that there was insufficient evidence to prove that petitioner sold cannabis. Rather, the trial court held that the scientific evidence, when augmented with nonscientific evidence, established that the substance sold was one species of a polytypic plant. This court held that the nonscientific evidence could not be used for that purpose, but noted that the trial court had never decided

whether the scientific evidence was sufficient to establish the lesser question of whether the substance was within the genus cannabis. Thus, this court did not hold that the evidence adduced at trial was insufficient. Rather, it simply held that the trial court had answered the wrong question. The trial court opined on whether the scientific evidence established that the substance was cannabis sativa L, but it offered no opinion on whether the substance was simply cannabis.

Thus, this case is no different than the case where a trial court mistakenly instructs the jury on the wrong statute. *See Forman v. United States*, 361 U.S. 416 (1960); *Hopt v. Utah*, 120 U.S. 430 (1887). Whether the evidence was sufficient to establish the crime wrongly submitted to the jury is irrelevant. The error in such a case is that the jury did not even consider the proper crime. The remedy, as in all other cases of trial error, is to retry the case so that the evidence can be evaluated against the proper standard. *Burks v. United States*, —— U.S. —— (1978); *Forman v. United States, supra*; *United States v. Ball*, 163 U.S. 662 (1896).

The same remedy applies here. This court did not hold that there was insufficient evidence to establish that petitioner sold marijuana. It held that that issue was never even addressed by the trial court. Therefore, *Burks v. United States*, —— U.S. —— (1978), is totally inapplicable and the only possible solution is that ordered by this court—a retrial of the case under a proper interpretation of the requirements of the marijuana statute.

CONCLUSION

Petitioner's Petition for Rehearing should be denied and judgment should be entered in accordance with this court's decision of October 20, 1978.

Respectfully submitted,

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